91-1760

Supreme Court, U.S.
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No. 92-

In the
Supreme Court of the United States

OCTOBER TERM, 1991

RICHARD CLARK JOHNSON,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Foreign Intelligence Surveillance Act, 50 U.S. C. § 1801 et seq., which permits a court to conduct an *in camera* and *ex parte* review of the government's application for authorization to conduct electronic surveillance, is inconsistent with the due process clause of the Fifth Amendment.

2. Whether the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 et seq., which permits the government to perform electronic surveillance without a prior showing of probable cause, is inconsistent with the Fourth Amendment's prohibition against unreasonable searches and seizures.

3. Whether 18 U.S.C. § 957, which prohibits the possession, in aid of any foreign government, of papers or property designed or intended for use in violating any penal statute, is unconstitutionally vague and overbroad.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No. 91- -----

RICHARD CLARK JOHNSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

Richard Clark Johnson petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit affirming his criminal convictions in the United States District Court for the District of Massachusetts.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-45a) is reported at 952 F.2d 565 (1st Cir. 1991).

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1991. A timely petition for rehearing was denied on January 29, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and

the persons or things to be seized." U.S. Const. amend. IV.

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend V.

The Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801 et seq., is attached hereto as an appendix.

Section 957 of Title 18 of the United States Code provides in relevant part: "Whoever, in aid of any foreign government, knowingly and willfully possesses or controls any property or papers used or designed or intended for use in violating any penal statute, . . . shall be fined not more than $1,000 or imprisoned not more than ten years, or both."

STATEMENT

The Court of Appeals in this case affirmed petitioner's convictions, despite the fact that most of the evidence against him was obtained through electronic surveillances performed pursuant to a statute which permits the government to obtain authorizations through ex parte submissions to which a defendant -- an American citizen --never has access. Further, the statute permits such surveillance without a showing of probable cause and without regard to the subject's expectations of privacy. The Court of Appeals also found no flaw in a 1917 statute, never before used until petitioner was prosecuted under it, that criminalizes the possession of papers in aid of a foreign government. Petitioner seeks review of those holdings.

Richard C. Johnson was trained and educated as an electrical engineer, and

was employed in that capacity since 1972. He worked for numerous government contractor aerospace companies in California, including Hughes Aircraft, the Jet Propulsion Laboratory, and Northrop. In 1986, Johnson moved to Nashua, New Hampshire and began work with the Mitre Corporation, where his performance was outstanding and his record unblemished.

On July 26, 1988, the government received an authorization pursuant to the Foreign Intelligence Surveillance Act ["FISA"], 50 U.S.C. §§ 1801-1811, to conduct electronic surveillance of Richard Johnson's home in Nashua, New Hampshire and his parent's home in Harwich, Massachusetts during the period from August, 1988 through October, 1988. This surveillance produced no evidence of either criminal or foreign intelligence activity on Johnson's part.

The government sought and received a second authorization for telephone surveillance of Johnson's apartment and his parents' home on November 15, 1988. Because the government has refused to reveal the basis for these authorizations, Johnson has no idea on what grounds either of the FISA orders were issued.

On August 10, 1989, in a four count indictment, the government charged Johnson, together with four others, with conspiracy to violate the Arms Export Control Act in violation of 18 U.S.C. § 371; the substantive offense of violating the Arms Export Control Act, 22 U.S.C. §§ 2778(b)(1) and (c); conspiracy to injure and destroy British military helicopters in violation of 18 U.S.C. § 956; and possession and control of a workshop in Johnson's parents' basement, in aid of a body of

insurgents, in violation of 18 U.S.C. § 957. The government sought to prove at trial that for a period of almost ten years, Johnson had been assisting in the design and export to the Provisional Irish Republican Army of information and components related to bomb detonation devices.

Almost all of the government's evidence against Johnson consisted of the fruits of the second FISA surveillance. Prior to trial, Johnson moved to suppress the FISA evidence on the grounds that it was obtained in violation of both FISA and the Constitution. After a magistrate judge conducted an ex parte in camera review of the government's applications for FISA authorization and recommended that the motion be denied, the court denied Johnson's motion. Johnson was never permitted to review the government's

submissions, despite filing motions to compel their production both before trial and after the Court of Appeals had affirmed his conviction.

Johnson was convicted and sentenced on all counts.

REASONS FOR GRANTING THE WRIT

The Court has never reviewed a case arising under the Foreign Intelligence Surveillance Act in the thirteen years since its enactment, despite the fact that FISA has frequently, as here, been used not to gather foreign intelligence, but to obtain evidence for use in a criminal prosecution against a United States citizen. As is set forth below, FISA's criteria for authorizing surveillance ignore the mandates of the Fourth Amendment, and the procedures established by FISA for obtaining review of FISA-authorized surveillance are also inconsistent with the due process

clause. For these reasons, the petition should be granted.

FISA does not require the government to comply with the warrant requirement even after its purpose has shifted away from foreign intelligence gathering and toward criminal prosecution of a particular individual. Nor does FISA permit an authorizing court to weigh the varying expectations of privacy of surveillance subjects against the government's interest in national security, but instead creates broad categories of authorization that are incongruent with the Court's Fourth Amendment precedents.

The statute underlying Count Four of the indictment against petitioner, never before used as the basis for a prosecution, broadly bans the possession of papers in aid of a foreign government. The statute's sweep extends

to a substantial number of instances of lawful conduct that are at the core of the First Amendment's protection. Its potential for future misuse poses the risk of an enormous impact on free expression. For this additional reason, the petition should be granted.

I. THE ELECTRONIC SURVEILLANCE OF PETITIONER VIOLATED THE FOREIGN INTELLIGENCE SURVEILLANCE ACT AS WELL AS THE FOURTH AND FIFTH AMENDMENTS.

Johnson, a United States citizen, was the target of extensive government surveillance for months, in both his own and his parents' homes, yet to this day he has no information about the bases -- if any -- upon which this surveillance was conducted. He has therefore had no realistic opportunity to attack the validity of the surveillance, or the evidence it produced, either at trial or on appeal to the Court of Appeals. That

this criminal prosecution of an American citizen began as an unsuccessful fishing expedition for foreign intelligence should not relieve the government of its burden to demonstrate that its intrusive conduct was based upon probable cause.

FISA permits the government to obtain a court's authorization to conduct surveillance upon an ex parte finding that there is probable cause to believe that the target of the electronic surveillance is a foreign power or agent of a foreign power[1], and that the application filed by the government contains the statements and certifications required by FISA, including certifications that the

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1. The term "foreign power is defined by statute to include, inter alia, "a group engaged in international terrorism or activities in preparation therefor" or "a foreign-based political organization, not substantially composed of United States persons." 50 U.S.C. § 1801(a)(4)-(5).

"purpose of the surveillance is to obtain foreign intelligence information," and that the information sought "cannot reasonably be obtained by normal investigative techniques" 50 U.S.C. §§ 1804(a)(7)(B),(C); 1805(a)(3). A target of the resulting surveillance can never challenge these many necessary predicate findings, however, since he never learns the contents of the government's application. Instead, FISA provides that "if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States," review of any motion to suppress the fruits of the FISA surveillance "shall" take place in camera and ex parte. 50 U.S.C. § 1806(e).

These procedures are wholly inconsistent with fundamental notions of

due process. Petitioner is presented with a sealed black box into which he is not permitted to look, so that FISA's provisions for motions to suppress on the grounds that "the information was unlawfully acquired" or was not obtained "in conformity with an order of authorization or approval" are of no use. 50 U.S.C. § 1806(e). Moreover, the reviewing court is hamstrung in its efforts to determine the lawfulness of any particular FISA surveillance by the absence of one side of the adversarial process which ordinarily accompanies a motion to suppress. FISA's requirement that the review be ex parte and in camera upon the filing of a boilerplate affidavit by the government makes the process of challenging the fruits of any surveillance virtually meaningless.

In addition to these grave due process flaws in FISA, it is also

inconsistent with the requirements of the Fourth Amendment. This is so notwithstanding the fact that FISA touches on national security issues. In the only instance in which this Court has addressed the issue of foreign intelligence surveillance, it noted that "the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving of protection." United States v. United States District Court, 407 U.S. 297, 323 (1972) (requiring prior judicial approval of domestic security surveillance) (emphasis added). This language is a very slim reed upon which to place the authority to conduct foreign intelligence wiretaps -- with only an ex parte in camera review of executive applications. Moreover, the quoted passage makes plain that, rather than the categorical authorizations that

FISA allows, there must be a weighing of "the governmental interests to be enforced and the nature of citizen rights deserving protection." Id.[2]

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2. FISA creates two different categories into which all foreign intelligence surveillance requests are divided: the determining factor is the citizenship of the target. See, e.g., 50 U.S.C. § 1804(b) (relieving government of certain certification requirements where the target of surveillance is a "foreign power" and the places to which surveillance is directed are owned or leased exclusively by that "foreign power"); 50 U.S.C. § 1805(a)(5) (if the target of surveillance is a "United States person," the court must determine that the certifications made by the government in its application are "not clearly erroneous"). See also United States v. Duggan, 743 F.2d 59, 75 (2d Cir. 1984) (rejecting equal protection challenge based upon FISA's different treatment of citizens and non-citizens).

Of course, the Court does not use these categories to distinguish between lawful and unlawful warrantless searches, but instead considers the search in light of the target's reasonable expectation of privacy. See Katz v. United States, 389 U.S. 347 (1967); United States v. United States District Court, 407 U.S. at 313 (decision in Katz "implicitly recognized that the broad and unsuspected governmental incursions into conversational privacy which electronic surveillance entails necessitate the application of Fourth Amendment

Accordingly, where, as here, the surveillance is of an American citizen in his home, and where the primary purpose of the surveillance is not foreign intelligence but the prosecution of that individual, then the government cannot hide behind FISA, but must instead conform its conduct to the requirements of the Fourth Amendment.

The Fourth Amendment and its case law progeny mandates that once a United States citizen becomes the target of a criminal investigation, all subsequent searches of that person must be conducted pursuant to a warrant based on probable cause that the target committed ...

(footnote cont'd)

safeguards"). Citizenship is an unsatisfactory and indeed unconstitutional surrogate for these carefully reasoned criteria. See Abel v. United States, 362 U.S. 217 (1960) (extending Fourth Amendment protections to aliens).

a crime. See generally Michigan v. Clifford, 464 U.S. 287 (1984). This is true even if the investigation at its outset was conducted for intelligence-gathering purposes. As the Fourth Circuit has recognized: "The [foreign intelligence] exception applies only to foreign powers, their agents, and their collaborators. Moreover, even these actors receive the protection of the warrant requirement if the government is primarily trying to put together a criminal prosecution." United States v. Truong, 629 F.2d 908, 916 (4th Cir. 1988).

Even assuming arguendo that the purpose of the government's surveillance of Johnson from November 15, 1988 to April 10, 1989, was primarily to acquire foreign intelligence -- a point which petitioner by no means concedes, because he lacks the information necessary for

an intelligent assessment -- that purpose clearly changed after April 10, 1989. On that date, the government made plain its purpose -- the criminal investigation of Johnson -- by obtaining a search warrant to open a letter addressed to him. Yet even at this stage, the government was not required to demonstrate probable cause for the continued surveillance of Johnson's home and his parents' home.

Had the government wished to pursue its asserted national security interests, then it should have foregone prosecution of Johnson based upon the fruits of its surveillance. Even if evidence obtained pursuant to FISA can sometimes be used in criminal prosecutions, see 50 U.S.C. § 1806(c), such use can never be the "primary

purpose" of the surveillance.[3] See Select Committee on Intelligence, S. Rep. No. 95-701 at 61, reprinted in U.S. Code Cong. & Admin. News 4030 (1978) ("[t]he Department of Justice always has the option of deciding whether to proceed with a criminal prosecution or forego it in the interests of national security"). What the government may not do is compromise a criminal defendant's Fourth Amendment and due process rights by shrouding a criminal investigation in the cloak of "national security." The

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3. FISA itself does not indicate the degree of primacy of the purpose, stating only that the government must show "that the purpose of the surveillance is to obtain foreign intelligence information." 50 U.S.C. § 1804(7)(B). Indeed, requiring the government to show only that foreign intelligence is its primary rather than its exclusive purpose is already a significant curtailment of individual rights. Where the government's motives are mixed to any degree, it should be required to comply with the warrant requirements of the Fourth Amendment.

Court should grant this petition to review FISA in light of these significant challenges.

In addition to these flaws, the government failed to comply even with the minimal requirements of FISA itself. Section 1804(a)(9) of 50 U.S.C. requires that any application for authorization of surveillance include a "statement of the facts concerning all previous applications that have been made to any judge under this chapter involving any of the persons, facilities, or places specified in the application and the action taken on each previous application." There were at least two surveillances of Johnson, the first of which yielded no evidence related to foreign intelligence. The Court of Appeals recites in its opinion that the government "set forth the facts supporting prior applications," United

States v. Johnson, 952 F.2d at 573, but notably fails to recite that the second application informed the reviewing court that the first application was fruitless.

This is no mere nuance, but goes to the very heart of the constitutionally inadequate ex parte process authorized by FISA. Where a citizen is stripped of the protections of the Fourth Amendment, he should at the very least be permitted to demonstrate that the government has not met the far less stringent requirements of FISA. It is only through the adversary process that FISA's many open-ended terms can be given meaning and content. So, for example, petitioner might well have been able to show that "facts concerning all previous applications" should have included the "fact" that the previous application produced no information. 50

U.S.C. § 1804(a)(9). Without being permitted access to the government's submissions in support of its FISA applications, however, petitioner's hands were tied.

Despite these significant problems, the Court of Appeals rejected petitioner's FISA arguments. It held that the government's primary purpose was to obtain foreign intelligence information, notwithstanding that the application for a search warrant plainly indicated a change in purpose. It found no flaw in the government's first or second FISA application, although it did not permit petitioner to see those applications, even long after the purported national security information had become stale. The court also rejected petitioner's Fourth Amendment claims "for the reasons set forth by the Second Circuit in [United States v.]

Duggan, 743 F.2d at 72-74." United States v. Johnson, 952 F.2d at 573. The Duggan court, however, did not address or resolve the issues presented herein.

Accordingly, the petition should be granted, so that this Court can consider the adequacy of FISA under both the due process clause and the Fourth Amendment.

II. JOHNSON'S CONVICTION UNDER 18 U.S.C. § 957 FOR POSSESSION OF PROPERTY WAS UNCONSTITUTIONAL.

Section 957 of Title 18, U.S.C., the statute underlying Count Four of Johnson's conviction, punishes, inter alia, the possession of papers in aid of a foreign government.[4] This language,

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4. The statute provides as follows: "Whoever, in aid of any foreign government, knowingly and willfully possesses or controls any property or papers used or designed or intended for use in violating any penal statute, or any of the rights or obligations of the United States under any treaty or the law of nations, shall be fined not more than $1,000 or imprisoned not more than ten years, or both." 18 U.S.C. § 957.

enacted in 1917 and never before challenged or interpreted by the Court, is both substantially overbroad in its formulation and impermissibly vague in its application. Its potential future use poses a grave risk to the fundamental right of free expression.

As the Court of Appeals recognized, Johnson is entitled to raise an overbreadth challenge to this provision, since "a statute whose terms are so broad as to chill a 'substantial' amount of protected speech of parties not before the court, New York State Club Association v. City of New York, 487 U.S. 1, 14 (1988), may not be enforced against anyone, even one whose activity the statute legitimately governs." United States v. Johnson, 952 F.2d at 577, citing New York v. Ferber, 458 U.S. 747, 770 (1982) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973));

Magill v. Lynch, 560 F.2d 22, 29 (1st Cir. 1977).

The criminalization of the "willful" possession of papers "in aid of a foreign government" poses a serious threat to American citizens' basic right to speak out and participate in matters of international concern, a threat which dwarfs the statute's murky "legitimate sweep." Broaderick v. Oklahoma, 413 U.S. at 615.[5] The promise that such possession will be punishable only when it is "used or designed or intended for use" in violation of the United States' treaty obligations, international law,

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5. Compare Lamont v. Postmaster General, 381 U.S. 301 (1965) (invalidating regulation limiting access to printed matter "issued by or on behalf of any country" determined to be communist) with Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1 (1961) (upholding registration requirement for organizations "directed, dominated, or controlled by foreign governments or organizations").

or "any penal statute" provides inadequate protection against impermissible overbreadth.

As Johnson demonstrated below, "a substantial number of instances exist in which the [statute] cannot be applied constitutionally." New York State Club Association v. City of New York, 487 U.S. at 14. First, the statute predicates criminal liability on knowledge of the United States' treaty obligations and international law. The sweeping phrase "any penal statute" as easily comprehends Irish laws against contraception, South African racial codes, or even the criminal laws of the fifty states. To limit, as the district court apparently did, see United States v. Johnson, 738 F.Supp. 594, 597 (D.Mass. 1991), the interpretation of "any penal statute" to include only "federal offenses" makes little sense

when considered in light of the language,[6] syntax,[7] or purpose[8] of the statute.

Second, there is no indication in the statute's language that the phrase "used or intended for use" is, as the Court of Appeals held, to "limit punishment under the statute to cases where the papers or property at issue

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6. Compare 18 U.S.C. § 371 (punishing conspiracy to commit a federal offense) (emphasis added).

7. It would be clear grammatical error to relate "of the United States" to "penal statute." See generally United States v. Ron Pair Enterprises, 489 U.S. 235, 241 (1989) (concluding that contested statute's interpretation is "mandated" by its "grammatical structure"). Moreover, the references to treaty obligations and the law of nations imply more than they exclude the possibility that "any penal statute" includes penal codes of other nations.

8. Although the legislative history of § 957 is shrouded in obscurity, it was originally considered as part of the "Search Warrant" section of the 1917 Espionage Act, Title XI § 22, 40 Stat. 230 (1917).

fall within an exceedingly narrow category of material, what might be called instrumentalities of crime." United States v. Johnson, 952 F.2d at 578. Nor is it "clear" that "liability turns upon the possessor's intent to violate either a penal statute or an international obligation of the United States." Id. at 578 n.12 (emphasis in original). Instead, there is no indication in § 957 of whose "design" or "intent" may form the basis of a defendant's punishment.

The examples offered to the Court of Appeals continue to demonstrate the substantiality of the overbreadth problem in light of the ambiguities noted above. An individual could be charged under § 957 with possession of Abbie Hoffman's Steal This Book, a collection of suggestions on how to obtain restaurant meals, long distance

telephone service, and other goods and services without paying for them. The reader/possessor might not share the intent of the author, but might nonetheless be deemed in violation of § 957's broad ban. Similarly, a university professor who possesses a manifesto advocating revolution may also be within the scope of the statute. Nothing in § 957's language or in the opinion of the Court of Appeals diminishes the likelihood of such unconstitutional prosecutions.[9]

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9. The Court has never required a defendant raising an overbreadth challenge to offer evidence of particular individuals whose conduct is chilled by the offending statute. All thatis required is the demonstration of a number of "real" and "substantial" instances of constitutionally protected conduct that are within the ambit of the statute. Broaderick v. Oklahoma, 413 U.S. at 615. Accordingly, the observation of the Court of Appeals that "Abbie Hoffman's work remains popular" is not responsive to petitioner's overbreadth argument. United States v. Johnson, 952 F.2d at 577.

The argument that these threats to fundamental rights are hypothetical or unrealistic because of a history of desuetude cannot turn the vice of capricious governmental inaction into a virtue.[10] The very premise of the overbreadth doctrine is that society can ill-afford to stifle speech until a constitutionally acceptable statute is finally arrived at; "the value of the sword of Damocles is that it hangs -- not that it drops." Arnett v. Kennedy, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting).[11]

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10. Certainly, the long period of nonuse of § 957 did not impair this prosecution.

11. It is not to the government's credit that the statute has never before been enforced in its 74-year history. See Epperson v. Arkansas, 393 U.S. 97 (1968) (statute unenforced for more than forty years held to violate rights under the Equal Protection Clause). See also L. Rogers and W. Rogers, Desuetude as a Defense, 52 Iowa L. Rev. 1, 12 (1966) (noting that Martin Luther King, Jr. was the only person to be prosecuted for the crime of tax perjury in the state of Georgia). Professor Bickel also questioned whether due process would

The Court should grant the within petition to address the constitutional flaws in 18 U.S.C. § 957.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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(footnote cont'd)

countenance "a statute which has never been enforced . . . for three quarters of a century [to] be suddenly resurrected and applied." A. Bickel, The Least Dangerous Branch at 151 (1962).

APPENDICES

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 90-2010

United States,
Appellee,

v.

RICHARD CLARK JOHNSON,
Defendant, Appellant.

No. 90-2011

UNITED STATES,
Appellee
v.
MARTIN QUIGLEY,
Defendant, Appellant.

No. 90-2012

UNITED STATES,
Appellee,
v.
CHRISTINA LEIGH REID,
Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. A. David Mazzone, U.S. District Judge]

Before
Torruella, Circuit Judge,
Coffin and Timbers,* Senior Circuit Judges.

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* Of the Second Circuit, sitting by designation.

Richard E. Bachman, by appointment of the court, with whom Peter D. King and Hale, Sanderson, Byrnes & Morton were on brief for appellant Martin Quigley.

Alan M. Dershowitz with whom Jack Zaremski, Kevin J. O'Dea, and Rosanna Cavallaro were on brief for appellant Richard Clark Johnson.

William P. Homans, Jr. with whom Homans, Hamilton & Dahmen was on brief for appellant Christina Leigh Reid.

Alexandra Leake, Assistant United States Attorney, with whom Wayne A. Budd, United States Attorney, Ronald R. Roos, Trial Attorney, and Christine M. Thren, Attorney Advisor, were on brief for appellee.

December 19, 1991

COFFIN, Senior Circuit Judge.

Appellants were convicted of conspiracy and substantive offenses for their roles in terrorist activities directed against the British presence in Northern Ireland. They seek to overturn their convictions and vacate their sentences on various grounds. After careful review of the record in this case, we affirm the judgments of the district court and uphold the convictions and sentences of all three appellants.[1]

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1. Arrest warrants for two others, Peter Eamon Maguire and Gerald Vincent Hoy, were issued along with those for appellants. Maguire is an Irish national who is not present in the United States, has not been arrested, and was not present at trial. Hoy pled guilty to the charges against him on May 29, 1990. Neither is a party to this appeal.

I. Background

The facts as the jury could have found them are as follows. From 1978 until his arrest in July 1989, appellant Richard Clark Johnson, an American citizen, was engaged in the research and development of explosives for export to the Republic of Ireland and use by the Provisional Irish Republican Army (the PIRA) in its attacks against British civilian and military targets there and elsewhere. Johnson is a highly educated and trained electrical engineer. Since receiving his Master's Degree in the early 1970's he has worked for a number of prominent firms in the aerospace industry, including Hughes Aircraft and the Northrop Corporation in California. From 1986 on Johnson carried out his weapons

research and development in a workshop built by him in the basement of his parents' home in Harwich, Massachusetts.

Between 1981 and 1986, Johnson wrote and sent a series of letters regarding the procurement and development of remote-control bombs to Peter Eamon Maguire, an electronic systems expert in the Republic of Ireland who is named a defendant in this case, see supra note 1. The letters ("the Clondalkin letters") describe Johnson's efforts to perfect the technology of the remote-control bombs that have been used by the PIRA in its attacks upon persons and property in Northern Ireland and elsewhere since 1972.[2] In 1987

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2. Johnson refers to the acquisition of 27 and 72 megahertz radio transmitters, the type

the Irish national police seized these letters from a hiding place in Maguire's home in Clondalkin, Dublin.

Appellant Martin Peter Quigley is a citizen of the Republic of Ireland and a

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of transmitter typically used by the PIRA in its remote-control bombs. The letters also chronicle Johnson's efforts to improve the detonation mechanism of the bombs through the use of laser technology, which would shield the system from jamming attempts. The FBI seized most of the components of this laser-based system from Johnson's workshop in Harwich.

The letters describe Johnson's attempts to enhance the detonator system by using the Weather Alert radio frequency. From August 1983 on, Northern Irish authorities began to recover the remains of Weather-Alert bombs in the wake of PIRA-sponsored bombings. The letters also describe Johnson's procurement of model FX-401 frequency selector switches, used by the PIRA as decoders in its remote-control bombs, and his efforts to develop a time-delayed fuse controlled by a digital wrist watch.

United States resident. Like Johnson, he has been involved in ongoing efforts to improve the technology of PIRA weaponry. In December 1988, in a conversation over a pay telephone, Quigley solicited Johnson's advice regarding the development of a surface-to-air missile system to "counteract" British military helicopters in Northern Ireland. Between 1988 and 1989, Quigley regularly encouraged appellant Christina Leigh Reid to join an amateur rocketry society and familiarize herself with the construction and operation of rocket motors for use in the anti-helicopter missile system. In the summer of 1989, Quigley participated in the acquisition of a .50 caliber rifle for export to the Republic of Ireland.

Appellant Christina Leigh Reid, an American citizen, is a college-educated electrical engineer and was employed by a defense-related firm in California until her arrest. From 1983 on, she served as a courier of electronic components for the remote-control bombs and of information, including a request for handguns, between Johnson in the United States and "Sean," an associate of Maguire, in the Republic of Ireland. In the summer of 1983, as national security efforts increased in preparation for the Los Angeles Olympic games, Reid provided a false social security number and address to obtain a post office box, in her name, to insure the safety and security of the Johnson-Maguire correspondence.

In later 1988, Reid introduced Johnson to Quigley, over the telephone, for the purpose of advancing the development of PIRA weaponry. It was during that telephone call that Quigley requested Johnson's assistance in developing the anti-helicopter missile system. Thereafter, Reid, with Quigley's encouragement, sought to join an amateur rocketry society with a view to learning about rocket motors and assisting in the deployment of the anti-helicopter missile system.

A federal grand jury returned a four count superseding indictment (the indictment) against appellants on March 22, 1990. Count One charged all three appellants with conspiracy to violate the Arms Export Control

Act, 22 U.S.C. § 2778(b)(2), (c) in violation of 18 U.S.C. § 371, by conspiring to export devices and materials for the discharge of bombs from the United States, without first obtaining an export license. Count Two charged Johnson with the actual manufacture and export of these materials, in violation of 22 U.S.C. §§ 2778(b)(1), (c). Count Three charged all three appellants with conspiracy to injure and destroy British military helicopters based at the Royal Air Force Station in Aldergrove, Northern Ireland in violation of 18 U.S.C. § 956. Count Four charged appellants Johnson and Quigley with the possession and control of property, namely Johnson's Harwich, Massachusetts laboratory, used and intended for use in the

destruction of British military helicopters in aid of the PIRA, in violation of 18 U.S.C. §§ 957 and 2.

Appellants filed various motions before and during trial. We discuss those relevant to this appeal briefly. All three appellants moved for the suppression of evidence acquired through the government's electronic surveillance of Johnson and Quigley. In addition. all three moved to dismiss Count Three of the indictment for failure to describe with adequate specificity the helicopters that appellants conspired to destroy. Johnson and Quigley moved to dismiss Count Four of the indictment on the ground that the underlying statute, 18 U.S.C. § 957, violates the First and Fourteenth

Amendments of the United States Constitution. Quigley moved for severance of his trial from that of the co-defendants.

The district court denied appellants' motions. Following a twenty-eight day trial, the jury found all three appellants guilty of the charges against them, and the district court sentenced appellants accordingly. On appeal, Johnson, Quigley and Reid assert numerous grounds for reversing their convictions and, in the case of Quigley and Johnson, vacating their sentences. We now turn to our discussion of these claims.

II. The FISA Surveillance Evidence

Between August 1988 and July 1989, the time of appellant's arrests, the government

conducted electronic surveillance of Johnson and Quigley pursuant to the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-11 (FISA).[3] Enacted in 1978, FISA establishes a statutory procedure whereby a federal officer, acting through the Attorney General, may obtain a judicial warrant authorizing the use of electronic surveillance in the United States for foreign intelligence purposes. See S. Rep. No. 604, 95th Cong., 2d Sess. (1978), reprinted in 1978 U.S.C.C.A.N. 3904, 3906; United States v. Duggan, 743, F.2d 59, 77 (3d Cir. 1984).

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3. The government did not seek to subject Reid to electronic surveillance. Her conversations were recorded only to the extent that they were with Johnson or Quigley.

The results of the surveillance undertaken in this case include audio tapes of incriminating conversations among appellants and constitute a substantial portion of the government's evidence. The government identified for appellants the tapes that it intended to use at trial and made available to them all of the tapes in advance of trail.

Prior to trial all three appellants moved for suppression of the FISA evidence, arguing that it had been obtained in violation of FISA and the United States Constitution. The Attorney General having filed an affidavit that disclosure of the FISA applications and orders would jeopardize national security interests, the magistrate

judge conducted an ex parte in camera review of the materials.[4] The magistrate judge concluded that the surveillance was legal in all respects and, in a lengthy and careful opinion, recommended that appellants' suppression motions be denied. The district court adopted this recommendation.

Appellants renew their suppression arguments on appeal. At the request of all parties, this court has conducted its own ex

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4. FISA § 1806(f) provides that where the Attorney General files an affidavit that disclosure of an adversary hearing on FISA related material would harm the national security of the United States, the district court if prohibited from disclosing the contested material. Under such circumstances, the district court is to review the material in camera and ex parte to determine whether the surveillance was lawfully authorized and conducted.

parte, in camera review of the surveillance applications and orders. Having done so, we agree with the magistrate judge and the district court that the FISA surveillance of appellants was lawfully authorized and conducted.

A. Threshold Challenge

1. Purpose of the FISA Surveillance

Appellants attack the government's surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign

intelligence information and a detailed description of the nature of the information sought. See §§ 1802(a)(1)(A), 1804(a)(6), (7). Although evidence obtained under FISA subsequently may be used in criminal prosecutions, see S. Rep. No. 701, 95th Cong., 2d Sess. (1978), reprinted in 1978 U.S.C.C.A.N. 3973, 3979-86 [hereinafter S. Rep. No. 95-701]; Duggan, 743 F.2d at 78, the investigation of criminal activity cannot be the primary purpose of the surveillance. See Duggan, 743 F.2d at 77; United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980). The act is not to be used as an end-run around the Fourth Amendment's prohibition of warrantless searches.

We find no evidence of an end-run in

this case. From our review of the government's FISA applications, it is clear that their primary purpose, from the first authorization in July 1988, to July 1989, when appellants were arrested, was to obtain foreign intelligence information, not to collect evidence for any criminal prosecution of appellants. The government's inquiries were all directed to activities relating to the support of PIRA operations in Northern Ireland. At no point was there reference to any criminal liability or prosecution.

2. Showing of Necessity

In a variation on the "impermissible purpose" argument, Johnson and Reid argue that their United States citizenship and residence render the FISA surveillance of

them illegal under both the FISA and the Fourth Amendment. We consider the statutory challenge first.

Where the government seeks FISA authorization for the surveillance of a "United States person," as opposed to a foreign national or a foreign power, FISA requires that it make a specialized showing that the information sought is "necessary to . . . the ability of the United States to protect against," inter alia, "sabotage or international terrorism by a foreign power or an agent of a foreign power; or clandestine intelligence activities by . . . a foreign power or by an agent of a foreign power," §§ 1801(e)(1)(B), (C), or that the information is "necessary to ... the conduct of the

foreign affairs of the United States," § 1801(e)(2)(B).

Johnson, joined by Reid, contends that because his work for the PIRA was not directed against the United States and because the government could not have shown that information regarding his PIRA activities was "necessary" to the conduct of foreign affairs or to the prevention of international terrorism, the FISA surveillance violated the statute.

The fact that appellant's terrorist activity was directed at Northern Ireland, rather than the United States, is of no consequence to the legality of the FISA surveillance, as the legislative history and plain language of FISA make clear. FISA

permits surveillance of an American person where the information sought is necessary to the ability of the United States "to protect against . . . international terrorism." § 1801(e)(1)(B). This class of information is manifestly broader than that comprising information necessary for the United States to protect itself against such dangers. As the drafters of FISA stated:

> The committee intends that terrorists . . . acting for foreign powers should be subject to surveillance under this bill when they are in the United States, even if the target of their violent acts is within a foreign country and therefore outside actual Federal . . . jurisdiction. This departure from a strict criminal standard is justified by the international responsibility of government to prevent its territory from being used as a base for launching terrorist attacks against other countries.

S. Rep. No. 95-701 at 3999, quoted in Duggan, 743 F.2d at 74.

Having reviewed the FISA applications in this case, we find that they conform to the standards governing the surveillance of American persons set forth in §1801(e). The applications reveal that Johnson had engaged in terrorist acts in support of PIRA efforts directed against British interests in Northern Ireland. They thus demonstrate that Johnson was a member of "a ground engaged in international terrorism or activities in preparation therefore," and, as such, an "agent of a foreign power." §§ 1801(a)(4), (b)(1)(A). In addition, the information sought by the government in its surveillance of Johnson was, in our estimate, necessary to

the ability of the United State to protect against international terrorism and to manage its foreign affairs. See Duggan, 743 F.2d at 74 ("[I]nternational terrorism conducted from the United States, no matter where it is directed, may well have a substantial effect on United States national security and foreign policy."); S. Rep. No. 95-701 at 3999.

Johnson and Reid also maintain that the FISA provisions governing the surveillance of United States citizens contravene the Fourth Amendment's prohibition of warrantless searches. This argument was apparently not raised before the magistrate judge. Before us, it achieves its fullest expression in a footnote to Johnson's Reply Brief. We

suspect, therefore, that appellants have waived this claim for purposes of their appeal. We have reviewed it, nonetheless, and find it to be without merit for the reasons set forth by the Second Circuit in Duggan, 743 F.2d at 72-74 (requirements of Fourth Amendment vary with governmental interest at stake; "'procedures established in [FISA] are reasonable in relation to legitimate foreign counterintelligence requirements and the protected rights of individuals.'" Id at 73 (quoting S. Rep. No. 95-701 at 3983)).[5]

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5. While it is true that the FISA target in Duggan was not a United States citizen, the court's reasoning applies with equal force to the surveillance of resident United States citizens.

B. The Legality of the Subsequent FISA Applications

Appellants challenge the legality of the government's applications to renew the initial surveillance order of July 1988. They argue that the government's failure to include the results of the first surveillance, conducted between July and October 1988, in its applications to extend the surveillance, filed subsequently, contravened the pertinent provisions of FISA.

We disagree with appellants' construction of the relevant FISA provisions for the reasons recommended by the magistrate judge and adopted by the district court. See Report and Recommendation of Magistrate Judge at 8-10 (Appellants' argument precluded by

FISA § 1805(d)(2), which permits FISA judge to extend surveillance authorization "on the same basis as [the] original order."). Moreover, we have reviewed the government's reauthorization applications in this case and find that each presented the court with facts establishing that appellants Johnson and Quigley were acting as agents of a foreign power, pursuant to §§ 1805(a)(2)(A), 1981(b)(2)(C), (D). Each application not only set for the the facts supporting prior applications, as required by § 1804(a)(9), but also meticulously supplied the FISA judge with new details of appellants' terrorist activity.

III. The Opening Statements and the Challenged PIRA Evidence

Appellants argue that the government's opening statement and the district court's admission of certain evidence over appellant's objections denied them the right to a fair trial guaranteed by the Sixth Amendment of the Constitution.

A. The Government's Opening Statement

Certain of the prosecution's opening remarks were, according to appellants, so improperly inflammatory as to prejudice irreparably their right to a fair trial. Appellants object to the government's characterization of the case as "'an echo of sadness from the graves of dead generations'" and its references to, among other things, the "bloody but abortive" Irish Republican uprisings against British rule, the PIRA's

bombing campaign of British civilian and military targets, and the acts of "ambush" and "sabotage" perpetrated by the PIRA "amongst the hedgerows, stone walls and narrow lanes of the Irish countryside." Appellants assert that the government's prejudicial comments mandate the reversal of their convictions.

This circuit recognizes the impropriety of prosecutorial commentary serving "no purpose other than 'to inflame the passions and prejudices of the jury, and to interject issues broader than the guilt or innocence of the accused,'" United States v. Machor, 879 F.2d 945, 956 (1st Cir. 1989) (quoting United States v. Doe, 860 F.2d 488, 494 (1st Cir. 1988)). We are, likewise, mindful of the

threat to a defendant's right to a fair trial posed by remarks foisting a theory of "guilt by association" upon the jury. United States v. St. Michael's Credit Union, 880 F.2d 579, 602 (1st Cir. 1989).

The remarks of the prosecutor are to be judged in light of the circumstances of the trial. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 238-42 (1940); United States v. Boldt, 929 F.2d 35, 40 (1st Cir. 1991). The challenged statements, in our view, were not improperly inflammatory. Though vivid and rhetorical, against a background redolent of long continued violence and carnage they did not exceed the bounds of adversarial propriety. We are confident that the prosecutor's remarks had

no effect on the outcome of the twenty-eight day trial. See Boldt, id. (prosecutorial impropriety subject to harmless error review). The government marshalled a wealth of evidence, most if it comprised of appellants' own admissions in telephone conversations and correspondence, of appellants' participation in the offenses for which they were charged and of their connections to the PIRA and its longstanding, ongoing terroristic campaign.

B. The Challenged Evidence

Appellants also maintain that the court improperly admitted various pieces of evidence: (1) an FBI video tape of an explosion caused by a simulated PIRA remote-control bomb; (2) a newspaper article

published by the PIRA's political arm recounting a failed PIRA bombing attempt; (3) an article from the same publication, seized from appellant Reid's apartment, describing the shooting down of a British military helicopter by the Irish Republican Army in Northern Ireland; (4) the testimony of a British commander forced to land his helicopter at the time of the PIRA attack recounted in the article;[6] and (5) testimony regarding the history and methods of the PIRA, including Maguire's role as one of its commanders and the development and deployment

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6. Reid alone challenges the admission of the newspaper Article describing the attack upon British helicopters and the testimony of Lieutenant Colonel Webb, the British commander who witnessed the raid.

of certain weapons by the PIRA.

To be admissible, evidence must be relevant to a material fact in issue, and its probative value must outweigh any prejudicial effect upon the jury. The evidence to which appellants object was relevant to their objectives on all four counts of the indictment, which charged appellants with acting "to further the forcible reunification of . . . Ireland . . . by means of an armed insurrection waged by the Provisional Irish Republican Army against British and Northern Ireland authorities." The testimony concerning the methods of the PIRA and the history of the Irish conflict, in particular, was relevant, given the characterization of the PIRA as a "body of insurgents" in Count

Four of the indictment.

Additionally, as the district court noted at trial, the challenged evidence was relevant to the determination of whether the various electronic components and information that appellants possessed and sought to export were, as the government charged, defense materials and services or were, instead, as appellants argued, the odds and ends of innocent hobbyists.

As for the evaluation of probative value and prejudicial effect under Fed. R. Evid. 403, it is uncontroverted that the district court's "battlefield determination is to be accorded great deference on appeal," United States v. Hadfield, 918 F.2d 987, 995 (1st Cir. 1990). "'Only rarely -- and in

extraordinarily compelling circumstances -- will we, from the vista of a cold appellate record, reverse a district court's on-the-spot judgment . . . .'" Pinkham v. Burgess, 933 F.2d 1066, 1071 (1st Cir. 1991) (quoting Freeman v. Package Machinery Co., 865 F.2d 1331, 1340 (1st Cir. 1988)).

The nub of appellant's unfair prejudice complaint is their contention that the challenged evidence caused the jury to convict "'on a theory of guilt by association,'" Johnson Opening Brief at 29 (quoting St. Michael's Credit Union, 880 F.2d at 602 (1st Cir. 1989)). As the district court indicated, however, there was considerable evidence, quite apart from that challenged, of appellant's involvement with

the PIRA. Appellants' own conversations and correspondence, as well as the possessions recovered from their homes -- the detonator designs and components and PIRA news articles -- demonstrate their approval of, and contribution to, the methods and goals of the PIRA. The risk of a "guilty by association" verdict against the backdrop of direct evidence of appellants' involvement with the PIRA, is remote, at best, and insufficient to warrant a finding of unfair prejudice.

IV. Count Three: Specificity of Charge and Proof

All three appellants seek to overturn their convictions under Count Three of the indictment on the ground that it failed to charge an offense with adequate specificity

and that the evidence at trial was insufficient to sustain convictions against them.

A. Specificity of the Charging Language

Count Three of the superseding indictment charged appellants with knowingly and willfully conspiring to injury and destroy "specific property belonging to the government of the United Kingdom . . . to wit: One or more of a total of less than seventy military helicopters of the Lynx, Gazelle, Puma, Chinook and Wessex class, based at the Royal Air Force Station at Aldergrove, Northern Ireland" in violation of

18 U.S.C. § 956.[7] Appellants claim that this language does not satisfy the specificity

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7. 18 U.S.C. § 956, "Conspiracy to injure property of a foreign government," provides:

> (a) If two or more persons with in the jurisdiction of the United States conspire to injure or destroy specific property situated within a foreign country and belonging to a foreign government or to any political subdivision thereof with which the United States is at peace, or any railroad, canal, bridge, or other public utility so situated and if one or more such persons commits an act within the jurisdiction of the United States to effect the object of the conspiracy, each of the parties to the conspiracy shall be fined . . . or imprisoned . . . or both.
>
> (b) Any indictment . . . under this section shall describe the specific property which it was the object of the conspiracy to injury or destroy.

requirement of § 956(b), which states that an indictment under the statute must describe the "specific property" that the defendants conspired to injury or destroy. Appellants argue that the indictment is defective because it identifies the targeted property by class -- a quantity of military helicopters stationed at a particular location -- rather than more particularly.

We concur in the thoughtful analysis of the magistrate judge adopted by the district court on this issue. See United States v. Johnson, 738 F. Supp. 591, 592-94 (D. Mass. 1990). From the legislative history of § 956 the magistrate judge concluded that the particularity requirement of § 956(b) was added to shield a discrete class of conduct

from the reach of § 956(a), namely, constitutionally protected activity, such as a pro-PIRA speech or a PIRA fund-raising event, that only indirectly implicates the injury of foreign property. See id. at 593.

Viewed in this light, the magistrate judge suggested, "the specificity requirement in Section 956 does not mean that the property which is the object of the conspiracy to destroy needs to be described in minute detail." Id. To require more specificity than the number, class, and location of the targeted property "would be to subvert the purpose and intent of the statute, in effect, to render it meaningless." Id. Indeed, in the case before us, the charging language describes

the vulnerable property with as much specificity as did the conspirators themselves. At no time did appellants single out a particular helicopter to be destroyed. Rather, the record reflects their commitment to the destruction of British military helicopters in Northern Ireland, generally.

B. Sufficiency of the Evidence

Appellants also assert that the evidence at trial was insufficient to warrant guilty verdicts against them on Count Three. Appellants' sufficiency challenge on Count Three tracks their specificity claim and, accordingly, fails. Although the evidence at trial established appellants' interest in an indeterminate number of helicopters comprised of several classes, rather than in any

particular machine, this was all that was required. And it is beyond question that, taking the evidence and all reasonable inferences therefrom in the light most favorable to the government, the jury could have found beyond a reasonable doubt that appellants sought to destroy a class of military helicopters stationed in a particular location. See United States v. Zannino, 895 F.2d 1, 9 (1st Cir. 1990) (sufficiency standard of review).

The jury had before it the transcript of the December 15, 1988 conversation in which Reid introduced Johnson to Quigley, and Quigley requested Johnson's assistance in devising an anti-helicopter missile system. As well, it had a copy of a 1988 article

published by the political arm of the PIRA and seized from Reid's apartment, recounting the destruction of a British army helicopter in Northern Ireland by the Irish Republic Army and describing the helicopters as "a priority target." From the apartment of defendant Hoy, a coconspirator in this case, see supra note 1, the FBI seized a handwritten list of the five classes of helicopters stationed at the Royal Air Force Station in Aldergrove, Northern Ireland, and a copy of British Military Helicopters, both of which were presented to the jury. The government also introduced a variety of direct evidence, in the form of intercepted conversations, of the efforts of Reid and Quigley to obtain access to rocket motors

thorough a rocketry society. Taking this and the rest of the evidence in the light most favorable to the government, we must uphold the jury's guilty verdicts against appellants on Count Three.

IV. Count Four: First Amendment Challenge to 18 U.S.C. § 957

Johnson, on behalf of himself and Quigley,[8] claims that 18 U.S.C. § 957, the statute underlying Count Four of the indictment, violates the First and Fourteenth Amendments of the Constitution because it is "substantially overbroad in its formulation and impermissibly vague in its

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8. In his brief, Quigley incorporates Johnson's argument on this issue in its entirety. For ease of reference, however, we discuss the claim as it made only by Johnson.

application."[9] The thrust of his argument is that § 957 threatens "the core constitutional guarantees of unfettered political association and expression . . . ." Johnson Opening Brief at 33. Briefing neither the overbreadth nor vagueness arguments in accordance with the substantial law on point, Johnson instead merges the two in a series of sketchy complaints. We consider the overbreadth and vagueness arguments separately.

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9. 18 U.S.C. § 957 provides for the punishment of one who "in aids of any foreign government, knowingly and willfully possesses or controls any property or papers used or designed or intended for use in violating any penal statute, or any of the rights or obligations of the United states under any treaty or the law of nation."

A. Overbreadth

Johnson does not argue that his possession and control of the Harwich laboratory, in which he carried out research and development of PIRA weaponry, is protected expression of that § 957 was invalidly applied to him. Rather, he appears to concede that his conduct falls within the statute's "legitimate sweep." New York v. Ferber, 458 U.S. 747, 770 (1982) (quoting Broadrick v. Oklahoma, 423 U.S. 601, 615 (1973). Johnson is, nevertheless, entitled to raise an overbreadth challenge, since a statute whose terms are so broad as to chill a "substantial" amount of protected speech of parties not before the court, New York State Club Ass'n v. City of New York, 487 U.S. 1,

14 (1988), may not be enforced against anyone, even one whose activity the statute legitimately governs. See id. at 11; Ferber, 458 U.S. at 770 (quoting Broadrick, 413 U.S. at 615); Magill v. Lynch, 560 F.2d 22, 29 (1st Cir. 1977).

Johnson's First Amendment attack upon § 957 depends, therefore, upon the strength of his showing that the statute chills a substantial amount of protected expression. Toward this end, he asserts that § 957 threatens the "basic right to speak out and participate in matters of international concern," and provides examples, relegated to a footnote in his Reply Brief, of conduct that he maintains is impermissibly compromised by the statute's broad language.

His examples include the possession of blueprints for a robbery planned by someone else and the possession of a treatise on violent revolution, where the possessor knows but does not share the author's intent. Possession of Abby Hoffman's Steal This Book, is, according to Johnson, likewise chilled by § 957, presumably since the title of the work suggests an intent to violate a penal statute. At oral argument Johnson added two examples of actual individuals whose protected expression would fall within the statute's prohibitions: a university profession possessing pro-PLO literature, and a lawyer, Johnson's counsel, holding pro-Israeli materials.

Even under Johnson's expansive reading

of the reach of § 957, we are not persuaded that the likely impact of possible unconstitutional applications is sufficient to invalidate the statute, broadly worded though it may be. "It is clear . . . that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to overbreadth challenge." City Council v. Taxpayers For Vincent, 466 U.S. 789, 800 (1983). See also Ferber, 458 U.S. at 770, n. 25; Broadrick, 413 U.S. at 618. Rather, a "substantial overbreadth" determination requires that the party launching the facial attack "demonstrate from the text of [the statute] and from actual fact that a substantial number of instances exist in

which the [statute] cannot be applied constitutionally." New York State Club Ass'n, 487 U.S. at 14. See also Taxpayers for Vincent, 466 U.S. at 802.

Johnson's examples fall short of the requisite substantiality showing. Abby Hoffman's work remains popular, and we have been directed to no other books which, since the enactment of § 957 in 1948, have been chilled by the statute. Moreover, § 957 evidently has had no chilling effect upon the political speech of either the university professor or lawyer described by Johnson at argument. Indeed, that § 957 apparently has never been enforced until now, and that, since 1948, Americans have regularly expressed their support of subversive ideas

of institutions, often "in aid of a[] foreign government," § 957, counsels against a finding of substantial overbreadth in this case. See New York State Club Ass', 487 U.S. at 14, and Taxpayers for Vincent, 466 U.S. at 802 (refusing to find substantial overbreadth where litigants failed to develop adequate record of speech-deterrent impact on their parties).

We are unpersuaded by Johnson's First Amendment claim, not only because he has failed to demonstrate that § 957 substantially threatens the protected activity of parties not before the court, but also, and more importantly, because, as we read it, the statute does not impermissibly interfere with protected speech. Until now,

there has been no challenge to, and no occasion to interpret, § 957. The instant case, however, presents us with both. We therefore turn to our interpretation of the statute.

We agree with the district court that the objective of § 957 is "to prohibit certain conduct, not to impinge on constitutionally protected speech." United States v. Johnson, 738 F. Supp. 594, 596 (D. Mass. 1990). It is well settled that "the state may . . . curtail speech when necessary to advance a significant and legitimate state interest," where it does so in a viewpoint-neutral manner unrelated to the suppression of ideas. Taxpayers for Vincent,

466 U.S. at 804.[10] In the case before us, it is undisputed that the federal government has significant and legitimate interests in curbing criminal activity undertaken in aid of a foreign power and in ensuring the observance of its treaty obligations.

We believe that § 957 furthers this interest with only incidental impact upon First Amendment liberties. Punishment for

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10. See also United states v. O'Brien, 391 U.S. 367, 376 (1968) (where "'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important government interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms"); Texas v. Johnson, 491 U.S. 397, 407 (1989) (limiting application of lenient O'Brien rule "to those cases in which 'the governmental interest is unrelated to the suppression of free expression'" (quoting O'Brien, 391 U.S. at 377)).

the possession of papers or property is predicated not upon the subversive message of such materials, but upon their actual or intended use in the commission of a crime or the violation of an international obligation of the United States in aid of a foreign government.

In our view, the plain import of the 'used or intended for use' qualification in § 957 is to limit punishment under the statute to cases where the papers or property at least fall within an exceedingly narrow category of material, what might be called instrumentalities of crime.[11] This could

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11. In so construing § 957, we are guided by the principle that "application of the overbreadth doctrine is 'strong medicine' that should e invoked only 'as a last

include items obviously used for criminal purposes, such as counterfeit dollars and the printing press on which they are produced. The statute also would cover the possession of less telling materials, such as papers relating to the design of a bomb and property comprising the components with which it is to be built, where the possessor intends to use these items in violating a penal statute or an international obligation of the United

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resort,'" Secretary of State of Maryland v. J. H. Munson Co., 467 U.S. 947, 958 (1984) (quoting Broadrick, 413 U.S. at 613), as well as our duty to construe a federal statute to avoid constitutional problems where such a construction is reasonable and not contrary to congressional intent. See DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575 (1988); Arnett v. Kennedy, 416 U.S. 134, 162 (1974).

states in aid of a foreign government.[12]

One may not, on the other hand, be prosecuted under § 957 for exercising the "right to speak out and participate in matters of international concern," for possessing a manifesto urging "violent revolution," or for owning pro-Israeli or pro-PLO literature, as Johnson suggests. Nor, indeed, may one be subject to liability for the possession of any paper or property

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12. We reject Johnson's argument that the statute fails to specify whose "design" or "intent" controls the § 957 liability determination. A fair reading of the statute makes clear that liability turns upon the possessor's intent to violate either a penal statute or an international obligation of the United States.

merely advocating lawless activity.[13] We, therefore, are satisfied that to the extent that § 957 encroaches upon the exercise of free speech, it does so in furtherance of substantial government interests and in a manner unrelated to the suppression of ideas.[14]

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13. Johnson's objection to the absence of an "imminence" requirement from § 957 is, therefore, inapposite. See Johnson Reply Brief at 20, relying on Brandenberg v. Ohio, 395 U.S. 444 (1969) (state may not punish advocacy of illegal or violent action unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Id. at 447).

14. Consider, by way of contrast, the ban on "all First Amendment activities" from the terminal area of Los Angels International Airport, invalidated on overbreadth grounds in Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, 482 U.S. 569 (1987). In that case, thee Supreme Court

We cannot say that there will never be a case in which § 957, even as construed by us, might be applied impermissibly. To warrant facial invalidation, though, "the overbreadth of a statute must not only be real, but substantial as well . . . ." Ferber, 458 U.S. at 770 (quoting Broadrick 413 U.S. at 615). Having already addressed the inadequacy of Johnson's substantiality showing, we "must assume that 'whatever overbreadth may exist

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invalidated the resolution because it was an "absolute prohibition of speech" justified by "no conceivable governmental interest . . . ." Jews For Jesus, 483 U.S. at 575. Similarly, the Broadrick Court rejected petitioner's facial overbreadth challenge to a statute forbidding state employees from engaging in certain partisan political activity on grounds that the statute was "not . . . directed at particular groups or viewpoints," and that it sought "to regulate political activity in an even-handed and neutral manner." 413 U.S. at 616.

should be cured through case-by-case analysis of the fact situations to which [the statute's] sanctions . . . may not be applied.'" New York State Club Ass'n, 487 U.S. at 14 (quoting Broadrick, 413 U.S. at 615-16). More drastic measures than this, we are obliged to leave to Congress.

B. Vagueness

Johnson argues that § 957 is impermissibly vague in its application in violation of the Due Process Clause of the Fourteenth Amendment. We find that Johnson lacks standing to raise this claim.

It is settled beyond controversy that one whose conduct is clearly governed by a statute may not successfully challenge it for vagueness. See Parker v. Levy, 417 U.S. 733,

756 (1974); United States v. Morison), 844 F.2d 1057, 1071 (4th Cir. 1988) (citing Levy, id.). Johnson does not argue that § 957 was unfairly applied to him.[15] He maintains, instead, "that a defendant may . . . raise a facial challenge to § 957 on vagueness grounds," where First Amendment freedoms are involved. In Levy, a case which did implicate First Amendment liberties, the Supreme Court rejected precisely this argument, characterizing it as "a blending of the doctrine of vagueness with the doctrine of overbreadth . . . not . . . supported by

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15. The district court, adopting the report and recommendation of the magistrate judge, concluded, and we agree, that the statute was validly applied to Johnson and Quigley for their possession of the Harwich laboratory. See Johnson, 738 F. Supp. 597-98.

prior decisions of this Court." 417 U.S. at 756. We therefore do not reach the merits of Johnson's due process claim.

V. Quigley's Claims: Variance, Sufficiency, Severance

Appellant Quigley seeks reversal of the verdicts returned against him on a variety of grounds independent of those asserted by appellants as a group. He maintains that a prejudicial variance between the conduct charged in Count One and the evidence adduced at trial denied him a fair trial, that the evidence was insufficient to support his convictions on Counts one and Four, and that the district court's denial of his motion for severance deprived him a fair trial.

A. The Variance and Sufficiency Claims

Quigley argue that a prejudicial variance between the conspiracy charged in Count One[16] and the evidence adduced at trial produced reversible error. Count One describes a single conspiracy, spanning the years between 1981 and 1989, "to further the forcible reunification of Northern Ireland the and Republic of Ireland by means of an armed insurrection waged by the Provisional Irish Republican Army against British and Northern Ireland authorities." According to Quigley, however, the evidence at trial

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16. Count One charges all three appellants with conspiracy of export defense materials and services illegally in violation of 18 U.S.C. § 371 ("Conspiracy to commit offense or to defraud United States") and 22 U.S.C. § 2778.

proved the existence of two conspiracies, one directed at the export of defense articles and services for the perfection of remote-control bombs, and another aimed at the export of a missile system conceived specifically of the purpose of destroying British military helicopters.

Quigley insists that there was insufficient evidence of his involvement in any pre-1988 arms export activity to support his conviction for the broad conspiracy he finds charged in Count One. In United States v. Glenn), 828 F.2d 855 (1st Cir. 1987), we adopted a three part test for determining whether a prejudicial variance exists as to any defendant. We determine first whether there is "evidence sufficient to permit a

jury to find the . . . agreement that the indictment charges," Id. at 858. Where no such evidence exists, we consider whether the evidence is "sufficient to permit a jury, under a proper set of instructions, to convict the defendant of a related, similar conspiracy." Id. Where such evidence exists, we ask whether the variance amounts to "harmless error." Id.

Because we answer the first of the Glenn inquiries in the affirmative, we need not address the other two. On December 15, 1988, Quigley asked Johnson, over a pay telephone, to assist him in the production of a missile system "to counteract . . . low flying helicopters." Quigley adverted to his awareness of Johnson's pre-1988 work

perfecting PIRA weaponry, including a laser-detonation mechanism for the remote control bombs, and to his own past and ongoing efforts on this score.[17]

This conversation permits an inference that Quigley not only knew about, but also participated in, the pre-1988 operations. At the least, it shows that Quigley recognized

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17. For example, Quigley told Johnson, "As you probably guessed by now, I kind of, we're experiencing a slight technical problem;" "and you kids helped us out of these situations before and ah, we're looking to you once again"; "[a]s I was saying . . . we're developing a new system . . . ."; "it's a much different system . . . . But it's what's available to use as you well knew so some of these . . . use radar, infra-red, acoustic . .. magnetic, etcetera"; "[s]o we're kinda looking to you if, if possible, could you look into that field for us?" "As [Maguire] said to me . .. yourself and him we're always about ten years ahead of everybody else."

that the post-1988 missile system on which he worked was simply the most recent in a series of projects undertaken by the conspirators to assist the PIRA in its attacks against British interests in Northern Ireland. Thus, whatever his particular involvement in the pre-1988 work, we think the record at a minimum shows a "tacit understanding," Glenn 828 F.2d at 858, on Quigley's part, that he was joining an extant scheme to bring about the forcible reunification of Ireland. Quigley was properly charged, and found culpable for, his membership in the broad conspiracy described in Count One.

We find no merit to Quigley's argument that insufficient evidence existed to find that he committed overt acts in furtherance

of this conspiracy. Quigley's concession that "the exhibits seized from Quigley and Hoy showed that they had done the preliminary design of a rocket system to a point where construction could begin," is, by itself, enough to prove his involvement. Quigley has failed to demonstrate that a reasonable jury, taking all of the evidence, and reasonable inferences therefrom, in the light most favorable to the government, could not have returned a guilty verdict against him for the offense charged. Zannino, 895 F.2d at 9.[18]

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18. We also reject Quigley's sufficiency argument with respect to Count Four, which charged him with aiding and abetting Johnson in the possession and control of the Harwich laboratory. Quigley concedes that the evidence against him "consisted . . . of the facts that [he] and Johnson had discuss[ed] with each other various electronic projects

B. The Motion for Severance

Quigley argues that the district court's denial of his motion for severance under Fed. R. Crim. P. 14 violated his Sixth Amendment right to a fair trial.[19] His claim is hewn

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in the development of a rocket system; [that] their correspondence covered some details of technical work Johnson had done [,] and that Quigley visited the Johnson home . . . and viewed . . . Johnson's . . . 'laboratory workshop,'" where his fingerprints were found. Quigley Brief at 31. This evidence is sufficient to permit a reasonable jury to find that Quigley affirmatively participated in the Harwich "venture," and so aided and abetted in the offense charged. See Nye & Nissen v. United States 336 U.S. 613, 619 (1949); United States v. Lema, 909 F.2d 561, 569 (1st Cir. 1990).

19. Rule 14 provides, in relevant part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants . . . for trail together, the court may . . . grant

from the same wood as his prejudicial variance claim: because he was not involved in the pre-1988 exportation of remote-control bomb components, he was substantially prejudiced by the joint trial of all three appellants in this case.[20]

Our conclusion that Quigley was properly charged and convicted for the overall scheme alleged in Count One effectively resolves the severance claim as well. Because Quigley's

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a severance of defendants or provide whatever other relief justice requires.

20. Quigley objects to the introduction against him of the Johnson-Maguire "Clondalkin letter," "the Armagh device," (a remote-control bomb recovered from a PIRA-sponsored explosion), the FBI videotape of an explosion caused by a simulated PIRA bomb, a 1965 newspaper article published by the PIRA, and evidence of appellant Johnson's acquisition of bomb components.

involvement as a conspirator could be found to encompass both the pre-and the post-1988 exportation, there was no need to exclude evidence relevant to the pre-1988 activity from the jury's determination of his guilt. The trial court's refusal to grant Quigley his own trial, or to compartmentalize the evidence at the joint trial as Quigley would have preferred, therefore, cannot be deemed an abuse of discretion. See United States v. Natanel, 938 F.2d 302, 308 (1st Cir. 1991) (review of denial of severance motion is for abuse of discretion).

VI. Reid's Claims: Sufficiency of the Evidence[21]

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21. We have considered Reid's claim that the district court committed reversible error in

Reid argues that the verdicts returned against her on Counts One and Three were not supported by adequate evidence of her knowledge of the objective underlying the conspiracies charged. The indictment identifies the objective underlying the arms exportation conspiracy charged in Count One as the furtherance of "the forcible reunification of Northern Ireland and the Republic of Ireland by means of an armed insurrection waged by the [PIRA]." It describes the purpose of the anti-helicopter agreement charged in Count Three as the

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refusing to charge the jury precisely as she requested, and find it to be without merit. See United states v. Passos Paternina, 918 F.2d 979, 984 (1st Cir. 1990) (citing United States v. Gibson, 726 F.2d 869, 874 (1st Cir. 1984)).

injury and destruction of British military helicopters stationed at the Royal Air Force Station in Aldergrove, Northern Ireland.

It is axiomatic that to be found guilty of conspiracy, a defendant must be found to have had knowledge of, and an intent to further, the objectives of the conspiracy. See United states v. Rengifo, 858 F.2d 800, 808 (1st Cir. 1988); United States v. Marsh, 747 F.2d 7, 12 (1st Cir. 1984). To obtain a guilty verdict against a defendant charged with conspiracy, however, the government need not show that the defendant concurred in every detail of the underlying objective of the conspiracy; nor need it prove that she appreciated the full extent of the illegal enterprise. See United States v.

Rivera-Santiago, 872 F.2d 1073, 1079 (1st Cir. 1989). All that is required is a showing "that [the defendant] appreciated 'the essential nature of the plan,' and freely determined to associate [her]self with it." United States v. Ruiz, 905 F.2d 499, 506 (1st Cir. 1990) (citation omitted) (quoting Rivera-Santiago, 872 F.1d at 1079 (quoting Blumenthal v. United States, 332 U.S. 539, 557 (1947))).

On Count One, there was more than adequate evidence upon which a reasonable jury might have found Reid not only to be "connected" with the charged exportation plan, but to have understood fully and joined wholeheartedly in it. The Johnson-Maguire "Clondalkin letters," which address the

design, construction, and export of remote-control bombs, contain numerous references to Reid's direct participation in the exportation scheme.

The letters describe Reid carrying a component for a bomb in June, 1983, to "Sean," an associate of Maguire in Northern Ireland, and to her delivering a message from "Sean" to Johnson that "Sean" was in need of handguns. The letters also state that Reid was, in the words of Johnson and Maguire, "doing a fine job," "really taking to electronics," "know[ing] her way around pretty well," becoming "a real asset," being "dazzled" by "Sean," and "doing the necessary gopher work." And, though, in their letters, Johnson and Maguire more often refer to Reid

as "the bird," "the girl," or "our young friend," rather than by name, a reasonable jury certainly could have found that this person, and "the young lady . . . named Chris" and "C. Reid," were one and the same.

The evidence also established that in 1983 Reid gave a false address and social security number in order to secure a post office box in her name for use by Johnson and Quigley to insure the continued security of their correspondence. Seized from Reid's apartment was a note requesting her to ship "as soon as possible" a PRO 30 scanner, a variant of which was recovered from a PIRA car bomb detonated in Northern Ireland in 1985. The note stated that "the rest of the gifts can follow at intervals as usual." In

addition, seized from Reid's apartment was a letter from one "Liam," asking Reid to warn Johnson that the Irish authorities had seized his letters to Maguire and to urge him not to respond to any letter without being certain of its authenticity.

As for Reid's knowledge of the objective of the anti-helicopter conspiracy, we need only point to her arrangement of and participation in the telephone conversation of December 15, 1988, in which Quigley requested Johnson's help in developing a missile system to destroy British helicopters. That Reid introduced Johnson to Quigley on the occasion of this exchange and, thereafter, corresponded with Quigley regularly on the subject of her joining a

rocketry society so that she might learn to operate rocket motors, would permit a reasonable jury to infer her knowledge and approval of the proposed bombing of the helicopters at Aldergrove.

Given the profusion of evidence of Reid's direct participation in the conspiracies charged, we cannot say that the jury unreasonably concluded that she understood and assented to their underlying purposes.[22] See Zannino, 895 F.2d at 9.

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22. In response to Reid's argument that the out-of court statements of coconspirators standing alone are insufficient to prove knowing participation beyond a reasonable doubt, we note, and Reid concedes, that neither the Supreme Court nor this circuit has ruled on this issue. We find, however, that adequate evidence existed on which the jury reasonably could have found knowledgeable participation on Reid's part,

VII. The Johnson and Quigley Sentences

Johnson and Quigley attack the legality of their sentences on several fronts.[23] We consider each in turn.

A. Sophisticated Weaponry

The government and appellants agree that U.S.S.G. § 2M5.2, "Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export

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even ignoring the written and spoken statements of Johnson and Quigley.

23. The district court sentenced Johnson to 60 months of incarceration on Count One, 120 months on Count Two, 36 months on Count three, and 120 months on Count Four, all to be served concurrently. It sentenced Quigley to a 60 month term of incarceration on Count One, a 36 month term on Count Three, and a 96 month term on Count Four, all to be served concurrently.

License,"was the applicable guideline for determining the sentences of Johnson and Quigley on Counts One and Two.[24] Johnson, however, on behalf of himself and Quigley, objects to the district court's determination that appellants' conduct involved a conspiracy to export "sophisticated weaponry" such that a base offense level of 22, rather than 14, was appropriate. The gist of appellants' argument is that the "defense articles" forming the basis of the illegal exportation offense charged in Count One may not be classified as "sophisticated" or, for

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24. Congress amended §2M5.2 in 1990. In its prior form, and as applied to appellants, § 2M5.2 set the base offense level at the greater of "(1) 22, if sophisticated weaponry was involved; or (2) 14."

that matter, as "weaponry," since "virtually every item [appellants were] alleged to export was readily available at hobby shops and consumer-oriented electronics stores, and . . . had common, nonmilitary applications." Johnson Opening Brief at 38.

We are unpersuaded, to say the least, by appellant's cast of the facts. It is precisely their skill in making extraordinary the ordinary that warrants a finding of "sophistication" under §2M5.2. As the Probation Department suggested, in a report adopted by the district court, "the ability to take readily available items and . . . using knowledge and skills gained through extensive education and on the job training . . . rework them so that they become a radio

controlled detonating device," underscores the sophistication of appellants' handiwork.[25] See also United States v. Nissen, 928 F.2d 690, 694 (5th Cir. 1991) (components "'involved' in a tangible way with 'sophisticated weaponry,'" are "sophisticated weaponry" within meaning of §2M5.2).

When reviewing a sentence under the guidelines, we accept the factual findings of the district court unless they are clearly erroneous. See 18 U.S.C. § 3742(e); United States v. Pilgrim Market Corp., No. 91-1581,

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25. Because we were not provided with the Addendum to the Presentence Report for appellant Johnson, in which this statement appears, we have excerpted it from the government's consolidated Brief at 101-02, n.75.

slip op. at 4-5 (1st Cir. Sept. 5, 1991). There was no error in the district courts' finding that appellants dealt in "sophisticated weaponry."

B. The Upward Departure

Appellants also argue that the district court wrongly departed upward from the guidelines sentencing range by considering factors that are not, according to appellants, "aggravating circumstances" permitting such departures. See U.S.S.G. §5K2.0.

At disposition, the district court specified the reasons for its departure decision. It referred to the "cool, deliberative, calculated" quality of appellants' conversations regarding the

development of weaponry in aid of the PIRA and the utter lack of "any expression of remorse or contrition" in these conversations. The court noted that appellants discussed the development of weapons likely to result in injury and death like "two trained individuals . . . discussing a mechanical problem that they had to solve." As well , the judge repeatedly referred to "the potential for death to innocent people" produced by appellants' activities. The court also referred to the "extreme" amount of "planning and sophistication" in the arms export conspiracy; the "multiple occurrences" of illegal conduct; and the threat posed by appellants' arms export conspiracy to an

American security interest, namely, the peaceful resolution of the conflict in Northern Ireland. In addition, the court characterized appellants' conduct as "terrorism, flat out," and reckoned this factor in its departure calculation.

Our review of departure decisions follows a three-step analysis. See United States v. Aymelek, 926 F.2d 64, 69 (1st Cir. 1991); United States v. Diaz-Villafane, 874 F.2d 43, 49 (1st Cir. 1989). We first inquire whether, as a matter of law, the circumstances relied upon by the sentencing court "are of a kind or degree that . . . may appropriately be relied upon to justify departure." Diaz-Villafane, id. Second, "we determine whether the circumstances, if

conceptually proper, actually exist in the . . . case." Id. Lastly, we measure the reasonableness of the direction and degree of the departure. See id. Regarding the third step, "appellate review must occur with full awareness of, and respect for, the trier's superior 'feel' for the case." Id. at 49-50; "[w]e will not lightly disturb decisions to depart . . . ." Id. at 50.

Under the first step of the Diaz-Villafane analysis we find that, as a matter of law, each of the circumstances relied upon by the court was an appropriate basis for the departure. Section 5K2.8 of the guidelines specifically authorizes a departure from the guidelines range for "unusually . . . cruel" or otherwise "extreme

conduct." More generally, §5K2.0 provides that the sentencing court may impose a sentence outside the range recommended by the guidelines if it finds any aggravating or mitigating circumstance "'of a kind or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.'" §5K2.0 (quoting 18 U.S.C. § 3553(b)).

While the district court did not specifically advert to §§ 5K2.8 or 5K2.0, we are free to consider their applicability. See Acha v. United states, 910 F.2d 28, 30 (1st Cir. 1990); Doe v. Anrig, 728 F.2d 30, 32 (1st Cir. 1984) (court of appeals free to affirm based on any ground supported by the record). The court did rely expressly upon

§5K2.14, which authorizes departures fro the endangering of the public welfare and national security, and on § 2M5.2, which permits departures where an extreme amount "of planning or sophistication" or "multiple occurrences," or a threat to national security is found. §2M5.2, comment. (n.2).

Appellants argue that the district court erred in deeming the threat to national security and the potential for death and destruction produced by appellants' conduct "aggravating circumstances," because, according to appellants, these factors were adequately taken in to account by the Sentencing Commission in establishing the guidelines. Appellants note that the Arms Export Control Act underlying Counts One and

Two of the indictment was enacted in "furtherance of world peace and the security and foreign policy of the United States," 22 U.S.C. § 2778(a)(1), and that § 2M5.2 of the guidelines, prescribing the case offense level for the arms export offenses, presumes the existence of a threat to national security and the potential for death and destruction. They similarly attack the court's reliance upon appellants' terroristic purpose in the departure determination, claiming that their convictions for the offense charged in Count Four were predicted upon terrorist activity, namely, their "aiding a faction and body of insurgents."

We find no merit to these arguments. Their logic would require that an

internationally trained terrorist bent on murdering scores of innocent civilians be sentenced no more severely than an unlicensed arms dealer; and that one who would provide arms to a body of insurgents be sentenced no more harshly than one who would supply them with drug paraphernalia. The guidelines plainly preclude such results. Section 5K2.0 permits an upward departure where factors -- a threat to national security or terroristic purpose, for example -- are present "to a degree substantially in excess of that which ordinarily is involved in the offense of conviction," or in any configuration "'not adequately taken into consideration'" by the Sentencing Commission, 9quoting 18 U.S.C. § 3553(b); emphasis added).

Turning to the second and third of the Diaz-Villafane steps, we are satisfied that there was ample evidence, much of it set forth in the foregoing portions of this opinion, to support the district court's findings on the factors justifying upward departure. In addition, we conclude that the degree of the departure, which effectively doubled Johnson's sentence, was reasonable.

"Although 'there appears to be some inherent tension in the guidelines themselves as to the extent to which departure is permissible,' we read the Guidelines as envisioning considerable discretion in departure decisions . . . ." Diaz-Villafane, 874 F.2d at 52 (citation omitted) (citing S. Rep. No. 225, 98th Cong., 2d Sess. (1984),

reprinted in 1984 U.S.C.C.A.N. 3182, 3235 (purpose of Guidelines "is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences")).

In Diaz-Villafane we upheld a departure that more than tripled defendant's maximum term. As we stated in that case, while "cognizant that departures should be the exception rather than the rule, we must nonetheless defer, within broad limits, to the trial judge's intimate familiarity with the nuances of a given case." 874 F.2d at 52 (citation omitted). Because we do not find the degree of departure in this case to be

"outside the universe of acceptable punishments," id., we defer to the district court's decision.

C. The Ex Post Facto Claim

Appellants argue that the district courts' reliance on the guidelines policy statement regarding terrorism, § 5M2.15, violates the Ex Post Facto Clause of Article I of the Constitution because the statement was issued in November 1989, after the criminal acts charged in the indictment were complete. We agree that the court improperly relied upon the statement, but we find this error to be of no consequence.

The bare fact that the district court applied § 5M2.15 to pre-November 1989 conduct does not mean that an ex post facto

punishment was visited upon appellants. In the sentencing arena, an ex post facto law is one that "'changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.'" Miller v. Florida, 482 U.S. 423, 429 (1987) (quoting Calder v. Bull, 3 Dall. 386, 390 (1798)).

Appellants have made no showing that the court's reliance upon § 5M2.15 resulted in the imposition of a more severe punishment than would otherwise have been ordered. As we have indicated, the trial court articulated a number of legitimate bases, while apart from the terrorism factor, for its departure decision. And, to the extent that the court sought to consider appellants'

terrorism an aggravating circumstance warranting an increased sentence, it was free to do so even before the publication of § 5M2.15. Upon issuing § 5M2.15, the Sentencing Commission commented that "[t]his amendment does not make a substantive change. Such conduct is . . . included in . . . other policy statements." U.S.S.G. App. C, at C.292 (Nov. 1991 ed.). See, e.g., § 5M2.0 ("[c]ircumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed an analyzed in advance").

We conclude that the trial court's references to § 5M2.15 at disposition did not violate appellants' constitutional right to

be free of ex post facto punishment.

D. Other Sentencing Issues

Appellants argue that the district court erred in using the arson guideline, § 2K1.4, to determine their sentences on the Count Four convictions. See 18 U.S.C. § 3553(b) ("[i]n the absence of an applicable sentencing guideline . . . the court shall . . . have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders . . . ."). This issue was not preserved for appeal, Johnson apparently having made no objection in the district court, and Quigley having explicitly approved the use of § 2K1.4 in his Sentencing Memorandum.

Appellants also contend the trial court erred in refusing to depart downward under § 2X1.1(b)(2) for an incomplete conspiracy. The record is ambiguous as to whether this claim, too, was waived; because the issue requires little discussion, however, we nevertheless choose to address it.

A trial court's discretionary refusal to depart downward from the guidelines sentencing range is not appealable. United States v. Lauzon, No. 90-1661, slip op. at 8-9 (1st Cir. July 16, 1991); United States v. Jiminez-Otero, 898 F.2d 813, 815 (1st Cir. 1990). We have appellate jurisdiction only "where it is unclear whether a district court's refusal to depart was based on an exercise of discretion or based upon the

district court's finding that it could not depart as a matter of law." Lauzon, slip op. at 8.

We conclude that review is impermissible here. Appellants and the government each argued the appropriateness of a § 2X1.1 departure based on the specific facts of this case. The court declined to depart downward on this ground in open court and on the record. See Tr. Disposition at 14. We have no reason to believe that its decision resulted from anything other than a discretionary determination that the government had the better of the two arguments.

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 90-2010

UNITED STATES,
Appellee,

v.

RICHARD CLARK JOHNSON,
Defendant, Appellant.

JUDGMENT
Entered December 19, 1991

This cause came on to be heard on appeal from the United States Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

_____
Clerk

(cc: Ms. Leake, Messrs. Backman, Dershowitz, Homans II)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-2010

UNITED STATES,
Appellee,

v.

RICHARD CLARK JOHNSON,
Defendant, Appallant.

BEFORE
Torruella, Circuit Judge,
COFFIN and Timbers*, Senior Circuit Judges.

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* Of the Second Circuit, sitting by designatio

ORDER OF COURT
Entered January 29, 1992

Upon consideration of the motion for order releasing government applications to conduct electronic surveillance and extending time to file petition for rehearing and rehearing en banc,

It is ordered that the motion is denied. The alternative request that the Court deem the motion a petition for rehearing and rehearing en banc is granted.

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing,

It is ordered that the petition for rehearing be denied.

By the Court:

FRANCIS P. SCIGLIANO, Clerk.

By: s/s_____
Chief Deputy Clerk

(cc: Ms. Leake, Messers. O'Dea, Dershowitz, Zaremski, Papalardo, Roos)

§ 1801. Definitions

As used in this chapter:

(a) "Foreign power" means—

(1) a foreign government or any component thereof, whether or not recognized by the United States;

(2) a faction of a foreign nation or nations, not substantially composed of United States persons;

(3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;

(4) a group engaged in international terrorism or activities in preparation therefor;

(5) a foreign-based political organization, not substantially composed of United States persons; or

(6) an entity that is directed and controlled by a foreign government or governments.

(b) "Agent of a foreign power" means—

(1) any person other than a United States person, who—

(A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section;

(B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or

(2) any person who—

(A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States;

(B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States;

(C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; or

(D) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C) or knowingly conspires with any person to engage in activities described in subparagraph (A), (B), or (C).

(c) "International terrorism" means activities that—

(1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;

(2) appear to be intended—

(A) to intimidate or coerce a civilian population;

(B) to influence the policy of a government by intimidation or coercion; or

(C) to affect the conduct of a government by assassination or kidnapping; and

(3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

(d) "Sabotage" means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

(e) "Foreign intelligence information" means—

(1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against—

(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to—

(A) the national defense or the security of the United States; or

(B) the conduct of the foreign affairs of the United States.

(f) "Electronic surveillance" means—

(1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;

(2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States;

(3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; or

(4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

(g) "Attorney General" means the Attorney General of the United States (or Acting Attorney General) or the Deputy Attorney General.

(h) "Minimization procedures", with respect to electronic surveillance, means—

(1) specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;

(2) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in subsection (e)(1) of this section, shall not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance;

(3) notwithstanding paragraphs (1) and (2), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes; and

(4) notwithstanding paragraphs (1), (2), and (3), with respect to any electronic surveillance approved pursuant to section 1802(a) of this title, procedures that require that no contents of any communication to which a United States person is a party shall be disclosed, disseminated, or used for any purpose or retained for longer than twenty-four

hours unless a court order under section 1805 of this title is obtained or unless the Attorney General determines that the information indicates a threat of death or serious bodily harm to any person.

(i) "United States person" means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section.

(j) "United States", when used in a geographic sense, means all areas under the territorial sovereignty of the United States and the Trust Territory of the Pacific Islands.

(k) "Aggrieved person" means a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance.

(*l*) "Wire communication" means any communication while it is being carried by a wire, cable, or other like connection furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications.

(m) "Person" means any individual, including any officer or employee of the Federal Government, or any group, entity, association, corporation, or foreign power.

(n) "Contents", when used with respect to a communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication.

(*o*) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

§ 1802. Electronic surveillance authorization without court order; certification by Attorney General; reports to Congressional committees; transmittal under seal; duties and compensation of communication common carrier; applications; jurisdiction of court

(a)(1) Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this chapter to acquire foreign intelligence information for periods of up to one year if the Attorney General certifies in writing under oath that—

(A) the electronic surveillance is solely directed at—

(i) the acquisition of the contents of communications transmitted by means of communications used exclusively between or among foreign powers, as defined in section 1801(a)(1), (2), or (3) of this title; or

(ii) the acquisition of technical intelligence, other than the spoken communications of individuals, from property or premises under the open and exclusive control of a foreign power, as defined in section 1801(a)(1), (2), or (3) of this title;

(B) there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party; and

(C) the proposed minimization procedures with respect to such surveillance meet the definition of minimization procedures under section 1801(h) of this title; and

if the Attorney General reports such minimization procedures and any changes thereto to the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence at least thirty days prior to their effective date, unless the Attorney General determines immediate action is required and notifies the committees immediately of such minimization procedures and the reason for their becoming effective immediately.

(2) An electronic surveillance authorized by this subsection may be conducted only in accordance with the Attorney General's certification and the minimization procedures adopted by him. The Attorney General shall assess compliance with such procedures and shall report such assessments to the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence under the provisions of section 1808(a) of this title.

(3) The Attorney General shall immediately transmit under seal to the court established under section 1803(a) of this title a copy of his certification. Such certification shall be maintained under security measures established by the Chief Justice with the concurrence of the Attorney General, in consultation with the Director of Central Intelligence, and shall remain sealed unless--

(A) an application for a court order with respect to the surveillance is made under sections 1801(h)(4) and 1804 of this title; or

(B) the certification is necessary to determine the legality of the surveillance under section 1806(f) of this title.

(4) With respect to electronic surveillance authorized by this subsection, the Attorney General may direct a specified communication common carrier to—

(A) furnish all information, facilities, or technical assistance necessary to accomplish the electronic surveillance in such a manner as will protect its secrecy and produce a minimum of interference with the services that such carrier is providing its customers; and

(B) maintain under security procedures approved by the Attorney General and the Director of Central Intelligence any records concerning the surveillance or the aid furnished which such carrier wishes to retain.

The Government shall compensate, at the prevailing rate, such carrier for furnishing such aid.

(b) Applications for a court order under this chapter are authorized if the President has, by written authorization, empowered the Attorney General to approve applications to the court having jurisdiction under section 1803 of this title, and a judge to whom an

application is made may, notwithstanding any other law, grant an order, in conformity with section 1805 of this title, approving electronic surveillance of a foreign power or an agent of a foreign power for the purpose of obtaining foreign intelligence information, except that the court shall not have jurisdiction to grant any order approving electronic surveillance directed solely as described in paragraph (1)(A) of subsection (a) of this section unless such surveillance may involve the acquisition of communications of any United States person.

§ 1803. Designation of judges

(a) Court to hear applications and grant orders; record of denial; transmittal to court of review

The Chief Justice of the United States shall publicly designate seven district court judges from seven of the United States judicial circuits who shall constitute a court which shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States under the procedures set forth in this Act, except that no judge designated under this subsection shall hear the same application for electronic surveillance under this Act which has been denied previously by another judge designated under this subsection. If any judge so designated denies an application for an order authorizing electronic surveillance under this Act, such judge shall provide immediately for the record a written statement of each reason for his decision and, on motion of the United States, the record shall be transmitted, under seal, to the court of review established in subsection (b) of this section.

(b) Court of review; record, transmittal to Supreme Court

The Chief Justice shall publicly designate three judges, one of whom shall be publicly designated as the presiding judge, from the United States district courts or courts of appeals who together shall comprise a court of review which shall have jurisdiction to review the denial of any application made under this Act. If such court determines that the application was properly denied, the court shall immediately provide for the record a written statement of each reason for its decision and, on petition of the United States for a writ of certiorari, the record shall be transmitted under seal to the Supreme Court, which shall have jurisdiction to review such decision.

(c) Expeditious conduct of proceedings; security measures for maintenance of records

Proceedings under this Act shall be conducted as expeditiously as possible. The record of proceedings under this Act, including applications made and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of Central Intelligence.

(d) Tenure

Each judge designated under this section shall so serve for a maximum of seven years and shall not be eligible for redesignation, except that the judges first designated under subsection (a) of this section shall be designated for terms of from one to seven years so that one term expires each year, and that judges first designated under subsection (b) of this section shall be designated for terms of three, five, and seven years.

§ 1804. Applications for court orders

(a) Submission by Federal officer; approval of Attorney General; contents

Each application for an order approving electronic surveillance under this chapter shall be made by a Federal officer in writing upon oath or affirmation to a judge having jurisdiction under section 1803 of this title. Each application shall require the approval of the Attorney General based upon his finding that it satisfies the criteria and requirements of such application as set forth in this chapter. It shall include—

(1) the identity of the Federal officer making the application;

(2) the authority conferred on the Attorney General by the President of the United States and the approval of the Attorney General to make the application;

(3) the identity, if known, or a description of the target of the electronic surveillance;

(4) a statement of the facts and circumstances relied upon by the applicant to justify his belief that—

(A) the target of the electronic surveillance is a foreign power or an agent of a foreign power; and

(B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power;

(5) a statement of the proposed minimization procedures;

(6) a detailed description of the nature of the information sought and the type of communications or activities to be subjected to the surveillance;

(7) a certification or certifications by the Assistant to the President for National Security Affairs or an executive branch official or officials designated by the President from among

those executive officers employed in the area of national security or defense and appointed by the President with the advice and consent of the Senate—

(A) that the certifying official deems the information sought to be foreign intelligence information;

(B) that the purpose of the surveillance is to obtain foreign intelligence information;

(C) that such information cannot reasonably be obtained by normal investigative techniques;

(D) that designates the type of foreign intelligence information being sought according to the categories described in section 1801(e) of this title; and

(E) including a statement of the basis for the certification that—

(I) the information sought is the type of foreign intelligence information designated; and

(II) such information cannot reasonably be obtained by normal investigative techniques;

(8) a statement of the means by which the surveillance will be effected and a statement whether physical entry is required to effect the surveillance;

(9) a statement of the facts concerning all previous applications that have been made to any judge under this chapter involving any of the persons, facilities, or places specified in the application, and the action taken on each previous application;

(10) a statement of the period of time for which the electronic surveillance is required to be maintained, and if the nature of the intelligence gathering is such that the approval of the use of electronic surveillance under this chapter should not automatically terminate when the described type of information has first been obtained, a description of facts supporting the belief that additional information of the same type will be obtained thereafter; and

(11) whenever more than one electronic, mechanical or other surveillance device is to be used with respect to a particular proposed electronic surveillance, the coverage of the devices involved and what minimization procedures apply to information acquired by each device.

(b) Exclusion of certain information respecting foreign power targets

Whenever the target of the electronic surveillance is a foreign power, as defined in section 1801(a)(1), (2), or (3) of this title, and each of the facilities or places at which the surveillance is directed is owned, leased, or exclusively used by that foreign power, the

application need not contain the information required by paragraphs (6), (7)(E), (8), and (11) of subsection (a) of this section, but shall state whether physical entry is required to effect the surveillance and shall contain such information about the surveillance techniques and communications or other information concerning United States persons likely to be obtained as may be necessary to assess the proposed minimization procedures.

(c) Additional affidavits or certifications

The Attorney General may require any other affidavit or certification from any other officer in connection with the application.

(d) Additional information

The judge may require the applicant to furnish such other information as may be necessary to make the determinations required by section 1805 of this title.

§ 1805. Issuance of order

(a) Necessary findings

Upon an application made pursuant to section 1804 of this title, the judge shall enter an ex parte order as requested or as modified approving the electronic surveillance if he finds that—

(1) the President has authorized the Attorney General to approve applications for electronic surveillance for foreign intelligence information;

(2) the application has been made by a Federal officer and approved by the Attorney General;

(3) on the basis of the facts submitted by the applicant there is probable cause to believe that—

(A) the target of the electronic surveillance is a foreign power or an agent of a foreign power: *Provided*, That no United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the first amendment to the Constitution of the United States; and

(B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power;

(4) the proposed minimization procedures meet the definition of minimization procedures under section 1801(h) of this title; and

(5) the application which has been filed contains all statements and certifications required by section 1804 of this title and, if the target is a United States person, the certification or certifications are not clearly erroneous on the basis of the statement made under section 1804(a)(7)(E) of this title and any other information furnished under section 1804(d) of this title.

(b) Specifications and directions of orders

An order approving an electronic surveillance under this section shall—

(1) specify—

(A) the identify, if known, or a description of the target of the electronic surveillance;

(B) the nature and location of each of the facilities or places at which the electronic surveillance will be directed;

(C) the type of information sought to be acquired and the type of communications or activities to be subjected to the surveillance;

(D) the means by which the electronic surveillance will be effected and whether physical entry will be used to effect the surveillance;

(E) the period of time during which the electronic surveillance is approved; and

(F) whenever more than one electronic, mechanical, or other surveillance device is to be used under the order, the authorized coverage of the devices involved and what minimization procedures shall apply to information subject to acquisition by each device; and

(2) direct—

(A) that the minimization procedures be followed;

(B) that, upon the request of the applicant, a specified communication or other common carrier, landlord, custodian, or other specified person furnish the applicant forthwith all information, facilities, or technical assistance necessary to accomplish the electronic surveillance in such a manner as will protect its secrecy and produce a minimum of interference with the services that such carrier, landlord, custodian, or other person is providing that target of electronic surveillance;

(C) that such carrier, landlord, custodian, or other person maintain under security procedures approved by the Attorney General and the Director of Central Intelligence any records concerning the surveillance or the aid furnished that such person wishes to retain; and

(D) that the applicant compensate, at the prevailing rate, such carrier, landlord, custodian, or other person for furnishing such aid.

(c) Exclusion of certain information respecting foreign power targets

Whenever the target of the electronic surveillance is a foreign power, as defined in section 1801(a)(1), (2), or (3) of this title, and each of the facilities or places at which the surveillance is directed is owned, leased, or exclusively used by that foreign power, the order need not contain the information required by subparagraphs (C), (D), and (F) of subsection (b)(1) of this section, but shall generally describe the information sought, the communications or activities to be subjected to the surveillance, and the type of electronic surveillance involved, including whether physical entry is required.

(d) Duration of order; extensions; review of circumstances under which information was acquired, retained or disseminated

(1) An order issued under this section may approve an electronic surveillance for the period necessary to achieve its purpose, or for ninety days, whichever is less, except that an order under this section shall approve an electronic surveillance targeted against a foreign power, as defined in section 1801(a)(1), (2), or (3) of this title, for the period specified in the application or for one year, whichever is less.

(2) Extensions of an order issued under this chapter may be granted on the same basis as an original order upon an application for an extension and new findings made in the same manner as required for an original order, except that an extension of an order under this Act for a surveillance targeted against a foreign power, as defined in section 1801(a)(5) or (6) of this title, or against a foreign power as defined in section 1801(a)(4) of this title that is not a United States person, may be for a period not to exceed one year if the judge finds probable cause to believe that no communication of any individual United States person will be acquired during the period.

(3) At or before the end of the period of time for which electronic surveillance is approved by an order or an extension, the judge may assess compliance with the minimization procedures by reviewing

the circumstances under which information concerning United States persons was acquired, retained, or disseminated.

(e) Emergency orders

Notwithstanding any other provision of this chapter, when the Attorney General reasonably determines that—

(1) an emergency situation exists with respect to the employment of electronic surveillance to obtain foreign intelligence information before an order authorizing such surveillance can with due diligence be obtained; and

(2) the factual basis for issuance of an order under this chapter to approve such surveillance exists;

he may authorize the emergency employment of electronic surveillance if a judge having jurisdiction under section 1803 of this title is informed by the Attorney General or his designee at the time of such authorization that the decision has been made to employ emergency electronic surveillance and if an application in accordance with this chapter is made to that judge as soon as practicable, but not more than twenty-four hours after the Attorney General authorizes such surveillance. If the Attorney General authorizes such emergency employment of electronic surveillance, he shall require that the minimization procedures required by this chapter for the issuance of a judicial order be followed. In the absence of a judicial order approving such electronic surveillance, the surveillance shall terminate when the information sought is obtained, when the application for the order is denied, or after the expiration of twenty-four hours from the time of authorization by the Attorney General, whichever is earliest. In the event that such application for approval is denied, or in any other case where the electronic surveillance is terminated and no order is issued approving the surveillance, no information obtained or evidence derived from such surveillance shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any court, grand jury, department, office, agency, regulatory body, legislative committee, or other authority of the United States, a State, or political subdivision thereof, and no information concerning any United States person acquired from such surveillance shall subsequently be used or disclosed in any other manner by Federal officers or employees without the consent of such person, except with the approval of the Attorney General if the information indicates a threat of death or serious bodily harm to any person. A denial of the application made under this subsection may be reviewed as provided in section 1803 of this title.

(f) Testing of electronic equipment; discovering unauthorized electronic surveillance; training of intelligence personnel

Notwithstanding any other provision of this chapter, officers, employees, or agents of the United States are authorized in the normal course of their official duties to conduct electronic surveillance not targeted against the communications of any particular person or persons, under procedures approved by the Attorney General, solely to—

(1) test the capability of electronic equipment, if—

(A) it is not reasonable to obtain the consent of the persons incidentally subjected to the surveillance;

(B) the test is limited in extent and duration to that necessary to determine the capability of the equipment;

(C) the contents of any communication acquired are retained and used only for the purpose of determining the capability of the equipment, are disclosed only to test personnel, and are destroyed before or immediately upon completion of the test; and:

(D) *Provided*, That the test may exceed ninety days only with the prior approval of the Attorney General;

(2) determine the existence and capability of electronic surveillance equipment being used by persons not authorized to conduct electronic surveillance, if—

(A) it is not reasonable to obtain the consent of persons incidentally subjected to the surveillance;

(B) such electronic surveillance is limited in extent and duration to that necessary to determine the existence and capability of such equipment; and

(C) any information acquired by such surveillance is used only to enforce chapter 119 of Title 18, or section 605 of Title 47, or to protect information from unauthorized surveillance; or

(3) train intelligence personnel in the use of electronic surveillance equipment, if—

(A) it is not reasonable to—

(I) obtain the consent of the persons incidentally subjected to the surveillance;

(II) train persons in the course of surveillances otherwise authorized by this chapter; or

(III) train persons in the use of such equipment without engaging in electronic surveillance;

(B) such electronic surveillance is limited in extent and duration to that necessary to train the personnel in the use of the equipment; and

(C) no contents of any communication acquired are retained or disseminated for any purpose, but are destroyed as soon as reasonably possible.

(g) Retention of certifications, applications and orders

Certifications made by the Attorney General pursuant to section 1802(a) of this title and applications made and orders granted under this chapter shall be retained for a period of at least ten years from the date of the certification or application.

§ 1806. Use of information

(a) Compliance with minimization procedures; privileged communications; lawful purposes

Information acquired from an electronic surveillance conducted pursuant to this chapter concerning any United States person may be used and disclosed by Federal officers and employees without the consent of the United States person only in accordance with the minimization procedures required by this chapter. No otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character. No information acquired from an electronic surveillance pursuant to this chapter may be used or disclosed by Federal officers or employees except for lawful purposes.

(b) Statement for disclosure

No information acquired pursuant to this chapter shall be disclosed for law enforcement purposes unless such disclosure is accompanied by a statement that such information, or any information derived therefrom, may only be used in a criminal proceeding with the advance authorization of the Attorney General.

(c) Notification by United States

Whenever the Government intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding

in or before any court, department, officer, agency, regulatory body, or other authority of the United States, against an aggrieved person, any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this chapter, the Government shall, prior to the trial, hearing, or other proceeding or at a reasonable time prior to an effort to so disclose or so use that information or submit it in evidence, notify the aggrieved person and the court or other authority in which the information is to be disclosed or used that the Government intends to so disclose or so use such information.

(d) Notification by States or political subdivisions

Whenever any State or political subdivision thereof intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of a State or a political subdivision thereof, against an aggrieved person any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this chapter, the State or political subdivision thereof shall notify the aggrieved person, the court or other authority in which the information is to be disclosed or used, and the Attorney General that the State or political subdivision thereof intends to so disclose or so use such information.

(e) Motion to suppress

Any person against whom evidence obtained or derived from an electronic surveillance to which he is an aggrieved person is to be, or has been, introduced or otherwise used or disclosed in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the evidence obtained or derived from such electronic surveillance on the grounds that—

(1) the information was unlawfully acquired; or

(2) the surveillance was not made in conformity with an order of authorization or approval.

Such a motion shall be made before the trial, hearing, or other proceeding unless there was no opportunity to make such a motion or the person was not aware of the grounds of the motion.

(f) In camera and ex parte review by district court

Whenever a court or other authority is notified pursuant to subsection (c) or (d) of this section, or whenever a motion is made pursuant to subsection (e) of this section, or whenever any motion or request is made by an aggrieved person pursuant to any other

statute or rule of the United States or any State before any court or other authority of the United States or any State to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this Act, the United States district court or, where the motion is made before another authority, the United States district court in the same district as the authority, shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.

(g) Suppression of evidence; denial of motion

If the United States district court pursuant to subsection (f) of this section determines that the surveillance was not lawfully authorized or conducted, it shall, in accordance with the requirements of law, suppress the evidence which was unlawfully obtained or derived from electronic surveillance of the aggrieved person or otherwise grant the motion of the aggrieved person. If the court determines that the surveillance was lawfully authorized and conducted, it shall deny the motion of the aggrieved person except to the extent that due process requires discovery or disclosure.

(h) Finality of orders

Orders granting motions or requests under subsection (g) of this section, decisions under this section that electronic surveillance was not lawfully authorized or conducted, and orders of the United States district court requiring review or granting disclosure of applications, orders, or other materials relating to a surveillance shall be final orders and binding upon all courts of the United States and the several States except a United States court of appeals and the Supreme Court.

(i) Destruction of unintentionally acquired information

In circumstances involving the unintentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant

would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States, such contents shall be destroyed upon recognition, unless the Attorney General determines that the contents indicate a threat of death or serious bodily harm to any person.

(j) Notification of emergency employment of electronic surveillance; contents; postponement, suspension or elimination

If an emergency employment of electronic surveillance is authorized under section 1805(e) of this title and a subsequent order approving the surveillance is not obtained, the judge shall cause to be served on any United States person named in the application and on such other United States persons subject to electronic surveillance as the judge may determine in his discretion it is in the interest of justice to serve, notice of—

(1) the fact of the application;

(2) the period of the surveillance; and

(3) the fact that during the period information was or was not obtained.

On an ex parte showing of good cause to the judge the serving of the notice required by this subsection may be postponed or suspended for a period not to exceed ninety days. Thereafter, on a further ex parte showing of good cause, the court shall forego ordering the serving of the notice required under this subsection.

§ 1807. Report to Administrative Office of the United States Court and to Congress

In April of each year, the Attorney General shall transmit to the Administrative Office of the United States Court and to Congress a report setting forth with respect to the preceding calendar year—

(a) the total number of applications made for orders and extensions of orders approving electronic surveillance under this chapter; and

(b) the total number of such orders and extensions either granted, modified, or denied.

§ 1808. Report of Attorney General to Congressional committees; limitation on authority or responsibility of information gathering activities of Congressional committees; report of Congressional committees to Congress

(a) On a semiannual basis the Attorney General shall fully inform the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence concerning all electronic surveillance under this chapter. Nothing in this chapter shall be deemed to limit the authority and responsibility of the appropriate committees of each House of Congress to obtain such information as they may need to carry out their respective functions and duties.

(b) On or before one year after October 25, 1978, and on the same day each year for four years thereafter, the Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence shall report respectively to the House of Representatives and the Senate, concerning the implementation of this Act. Said reports shall include but not be limited to an analysis and recommendations concerning whether this Act should be (1) amended, (2) repealed, or (3) permitted to continue in effect without amendment.

§ 1809. Criminal sanctions

(a) Prohibited activities

A person is guilty of an offense if he intentionally—

(1) engages in electronic surveillance under color of law except as authorized by statute; or

(2) discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by statute.

(b) Defense

It is a defense to a prosecution under subsection (a) of this section that the defendant was a law enforcement or investigative officer engaged in the course of his official duties and the electronic surveillance was authorized by and conducted pursuant to a search warrant or court order of a court of competent jurisdiction.

(c) Penalties

An offense described in this section is punishable by a fine of not more than $10,000 or imprisonment for not more than five years, or both.

(d) Federal jurisdiction

There is Federal jurisdiction over an offense under this section if the person committing the offense was an officer or employee of the United States at the time the offense was committed.

§ 1810. Civil liability

An aggrieved person, other than a foreign power or an agent of a foreign power, as defined in section 1801(a) or (b)(1)(A) of this title, respectively, who has been subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used in violation of section 1809 of this title shall have a cause of action against any person who committed such violation and shall be entitled to recover—

(a) actual damages, but not less than liquidated damages of $1,000 or $100 per day for each day of violation, whichever is greater;

(b) punitive damages; and

(c) reasonable attorney's fees and other investigation and litigation costs reasonably incurred.

§ 1811. Authorization during time of war

Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this chapter to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress.

(2)

No. 91-1760

FILED
JUN 29 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

RICHARD CLARK JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

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QUESTIONS PRESENTED

1. Whether it violated the Due Process Clause of the Fifth Amendment for the district court to determine the lawfulness of electronic surveillance under the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. 1801 *et seq.*, through an in camera, ex parte review of submissions by the government.

2. Whether the electronic surveillance of petitioner for the purpose of obtaining foreign intelligence information violated his rights under the Fourth Amendment.

3. Whether 18 U.S.C. 957, which prohibits the possession, in aid of a foreign government, of papers or property used or intended for use in violating any penal statute or international obligation of the United States, violates the First Amendment on overbreadth grounds.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1760

RICHARD CLARK JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-97a) is reported at 952 F.2d 565.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1991. The petition for rehearing was denied on January 29, 1992. Pet. App. 100a-101a. The petition for a writ of certiorari was filed on April 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner

was convicted of conspiring to violate the Arms Export Control Act, 22 U.S.C. 2778(b)(2) and (c), by exporting devices for the discharge of bombs without an export license, in violation of 18 U.S.C. 371; manufacturing and exporting such devices, in violation of 22 U.S.C. 2778(b)(1) and (c); conspiring to injure the property of a foreign government, in violation of 18 U.S.C. 956; and possessing property used for violating United States law in aid of a foreign government, in violation of 18 U.S.C. 957. Pet. App. 11a-13a. He was sentenced to 120 months' imprisonment, to be followed by 36 months of supervised release. *Id.* at 78a n.23; Gov't C.A. Br. 11-12. The court of appeals affirmed. Pet. App. 1a-97a.

1. From 1978 until his arrest in July 1989, petitioner, an American citizen, engaged in research and development of explosives for export to the Republic of Ireland and use by the Provisional Irish Republican Army (PIRA) in its attacks against British civilian and military targets in Ireland and elsewhere. Between 1981 and 1986, petitioner sent a series of letters regarding the procurement and development of remote-control bombs to Peter Eamon Maguire, an electronic systems expert in the Republic of Ireland who was associated with the PIRA. The letters described petitioner's efforts to perfect the technology of the remote-control bombs used by the PIRA in its attacks on persons and property. In the letters, petitioner referred to the acquisition of 27 and 72 megahertz radio transmitters, the type typically used by the PIRA in its remote-control bombs. The letters also described petitioner's attempts to enhance the detonator system for the bombs by using the Weather Alert radio frequency. Since August 1983, Northern Irish authorities have recovered

fragments of Weather-Alert bombs in the wake of PIRA-sponsored bombings. Pet. App. 5a-7a & n.2.

In 1983, petitioner employed co-defendant Christina Leigh Reid as a courier of electronic components and information to "Sean," an associate of Maguire, in the Republic of Ireland. In 1988, Reid introduced petitioner to co-defendant Martin Peter Quigley, a citizen of the Republic of Ireland and a United States resident, who, like petitioner, was attempting to improve the PIRA's weapons technology. During a telephone conversation, Quigley requested petitioner's assistance in the development of a surface-to-air missile system to "counteract" British military helicopters in Northern Ireland. Pet. App. 7a-10a. Beginning in 1986, petitioner carried out his weapons research and development in a workshop that he built in the basement of his parents' home in Harwich, Massachusetts. *Id.* at 5a-6a.

Between August 1988 and July 1989, when petitioner was arrested, the government conducted electronic surveillance of petitioner and Quigley pursuant to the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. 1801 *et seq.* FISA establishes a procedure for a federal officer, acting through the Attorney General, to obtain a judicial warrant that authorizes the use of electronic surveillance in the United States for the purpose of obtaining foreign intelligence. 50 U.S.C. 1804, 1805. As a result of the electronic surveillance under FISA, the government recorded incriminating conversations between petitioner and his co-defendants. Pet. App. 13a-15a.

2. Prior to trial, the government notified petitioner and his co-defendants of its intention to introduce information derived from the FISA electronic surveillance. See 50 U.S.C. 1806(c). The government also provided the defense with copies of the logs, tran-

scripts, and tapes relating to the surveillance. Petitioner moved to suppress that evidence, contending that it was obtained in violation of the FISA statute and the Fourth Amendment, and he sought discovery of the FISA applications and orders. The Attorney General filed an affidavit stating that disclosure of those materials would jeopardize national security interests. The magistrate determined that disclosure of those documents was not necessary to make an accurate determination of whether the surveillance was lawful, and he therefore conducted an ex parte, in camera review of the FISA materials, as is authorized by 50 U.S.C. 1806(f). On the basis of that review, the magistrate concluded that the surveillance was lawfully authorized and conducted, and recommended that the suppression motion be denied.[1] The district court adopted that recommendation and admitted into evidence tapes of conversations derived from the FISA surveillance. Pet. App. 15a-16a.

3. The court of appeals affirmed petitioner's convictions. First, it rejected petitioner's contention that the electronic surveillance violated FISA in that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution.[2] The court noted that although the investigation of criminal activity cannot be the primary purpose of a FISA surveillance, evidence obtained under FISA may be used in criminal prosecutions. Pet. App. 18a; see 50 U.S.C. 1806(b) and (c). From its

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[1] Report and Recommendation, *United States* v. *Johnson*, Crim. No. 89-221-MA (D. Mass. Apr. 13, 1990), *reprinted in* Gov't C.A. Br. Addendum.

[2] An application for electronic surveillance under FISA must contain a certification, among other things, "that the purpose of the surveillance is to obtain foreign intelligence information." 50 U.S.C. 1804(a)(7)(B).

review of the government's FISA applications, the court concluded that the "primary purpose" for the surveillance of petitioner "was to obtain foreign intelligence information, not to collect evidence for any criminal prosecution." Pet. App. 19a.

Second, the court of appeals rejected petitioner's claim that the surveillance was illegal under FISA because petitioner's work for the PIRA was not directed against the United States and the information sought by the surveillance was not "necessary" to the prevention of international terrorism or the conduct of foreign affairs.[3] The court held that under FISA, the information sought need not be necessary to protect the United States against terrorism; it is sufficient if the information is necessary to the United States' ability to combat international terrorist activities. Pet. App. 22a. The court concluded that in light of petitioner's terrorist activities in support of the PIRA, the surveillance was justified under FISA to protect against international terrorism and to conduct the foreign affairs of the United States. *Id.* at 23a-24a.

The court of appeals also rejected petitioner's contention that the FISA provisions governing the surveillance of American citizens violate the Fourth

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[3] For authorization to conduct electronic surveillance of a United States person, FISA requires that the information sought be "necessary to * * * the ability of the United States to protect against," *inter alia*, international terrorism by a foreign power (which includes a "group engaged in international terrorism or activities in preparation therefor," 50 U.S.C. 1801(a)(4)), or that it be "necessary to * * * the conduct of the foreign affairs of the United States." 50 U.S.C. 1801(e)(1)(B) and (2)(B), 1804(a)(7)(D) and (E).

Amendment.[4] The court agreed, Pet. App. 25a, with the reasoning of the Second Circuit in *United States* v. *Duggan*, 743 F.2d 59 (1984), that the "procedures established in [FISA] are reasonable in relation to legitimate foreign counterintelligence requirements and the protected rights of individuals." 743 F.2d at 73 (quoting S. Rep. No. 701, 95th Cong., 2d Sess. 14 (1978)).[5]

Finally, the court of appeals rejected petitioner's claim that 18 U.S.C. 957 violates the First Amendment.[6] The court noted that petitioner did not assert that his research and development of weaponry was constitutionally protected, but based his attack on Section 957 on overbreadth grounds. Pet. App. 46a.

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[4] The court noted that that claim was not raised before the magistrate and was relegated to a footnote in petitioner's reply brief in the court of appeals. Pet. App. 24a; see Pet. C.A. Reply Br. 6 n.6. Although suggesting that the claim was therefore waived, the court nevertheless addressed it on the merits. Pet. App. 25a.

[5] Petitioner also contended that the government violated the requirements of FISA when it omitted the results of the first surveillance in its subsequent applications to extend the surveillance. Pet. App. 26a. The court of appeals held, Pet. App. 27a, that FISA permits the judge to extend a surveillance authorization on the same basis on which it issued the original order. See 50 U.S.C. 1805(d)(2). The court further found that the applications in this case "not only set forth the facts supporting prior applications, as required by [50 U.S.C.] 1804 (a)(9), but also meticulously supplied the FISA judge with new details of [petitioner's] terrorist activity." Pet. App. 27a.

[6] Section 957 states that "[w]hoever, in aid of any foreign government, knowingly and willfully possesses or controls any property or papers used or designed or intended for use in violating any penal statute, or any of the rights or obligations of the United States under any treaty or the law of nations, shall be fined not more than $1,000 or imprisoned not more than ten years, or both."

The court concluded, however, that Section 957, although "broadly worded," does not reach a substantial amount of protected speech and therefore was not substantially overbroad. Pet. App. 49a, 58a-59a. The court explained that the purpose of the statute is not to regulate speech, but to punish the intended use of papers or property in crimes; it therefore construed the statute to apply only where "the papers or property * * * fall within an exceedingly narrow category of material, what might be called instrumentalities of crime." *Id.* at 54a. The court declined to review petitioner's claim that the statute is impermissibly vague in violation of the Due Process Clause, stating that since Section 957 clearly applies to petitioner, he lacks standing to assert that it might be vague as applied to others. Pet. App. 59a-61a.[7]

ARGUMENT

1. Petitioner contends (Pet. 7-10, 18) that the authorization for a district court to review the validity of electronic surveillance under FISA through in camera, ex parte proceedings violates the Due Process Clause of the Fifth Amendment. That claim does not merit this Court's review.

First, petitioner did not raise his due process claim in the court of appeals, and that court did not consider the Fifth Amendment issue presented here. "Ordinarily, this Court does not decide questions not

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[7] The court of appeals also rejected petitioner's claims that the government's opening statement was prejudicial and that certain evidence was improperly admitted, Pet. App. 27a-36a; that Count 3 of the indictment failed to charge an offense and that the evidence supporting that count was insufficient, *id.* at 38a-44a; and that petitioner was sentenced incorrectly, *id.* at 73a-97a. Petitioner does not renew those contentions in this Court.

raised or resolved in the lower courts." *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam); see *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927). Petitioner suggests no reason for this Court to depart from its usual practice.

Second, petitioner's claim has been uniformly rejected by the lower courts.[8] Nothing in this Court's cases casts doubt on that result. See *Taglianetti* v. *United States*, 394 U.S. 316, 317 (1969) (per curiam) (upholding in camera examination of government materials in a challenge to electronic surveillance); *Giordano* v. *United States*, 394 U.S. 310, 314 (1969) (Stewart, J., concurring) ("We have nowhere indicated that this determination [whether a surveillance violated the Fourth Amendment] cannot appropriately be made in *ex parte*, *in camera* proceedings.").

Third, FISA does not violate due process. The purpose of FISA is to regulate "the use of electronic surveillance within the United States for foreign intelligence purposes." S. Rep. No. 604, 95th Cong., 1st Sess. Pt. 1, at 7 (1977). FISA creates a detailed set of "statutory safeguards" to protect against abuses in the use of electronic surveillance, *ibid.*, while implementing the "vitally important Government purpose" of gathering "necessary foreign intelligence information," *id.* at 9. In enacting FISA, Congress recognized the need for security and confidentiality sur-

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[8] See *United States* v. *Isa*, 923 F.2d 1300, 1306-1307 (8th Cir. 1991); *United States* v. *Ott*, 827 F.2d 473, 476-477 (9th Cir. 1987); *United States* v. *Belfield*, 692 F.2d 141, 148-149 (D.C. Cir. 1982); *United States* v. *Spanjol*, 720 F. Supp. 55, 59 (E.D. Pa. 1989); *United States* v. *Megahey*, 553 F. Supp. 1180, 1193-1194 (E.D.N.Y. 1982), aff'd, 729 F.2d 1444 (1983) (Table); *United States* v. *Falvey*, 540 F. Supp. 1306, 1315-1316 (E.D.N.Y. 1982).

rounding the sources, techniques, and fruits of such intelligence.[9] FISA therefore provides that district courts must conduct an in camera and ex parte review to determine an aggrieved person's motion to suppress the fruits of FISA surveillance whenever, as here, "the Attorney General files an affidavit under oath that disclosure [of the FISA applications and orders] or an adversary hearing would harm the national security of the United States." 50 U.S.C. 1806(f). When such an affidavit is filed, "the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance." 50 U.S.C. 1806(f).

Contrary to petitioner's contention, Section 1806(f) is not unconstitutional. The government has a compelling interest in conducting electronic surveillance of foreign powers and their agents, and that interest would obviously be compromised, if not altogether frustrated, if the government were required to reveal the background information prompting such investi-

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[9] FISA creates a special court, designated by the Chief Justice. The court consists of seven district court judges who determine whether to issue orders approving electronic surveillance, and a special appellate court of three judges who review FISA orders. 50 U.S.C. 1803. Orders approving FISA surveillance are entered ex parte. 50 U.S.C. 1805. If review of a denial of a FISA application is sought in this Court, the record is to "be transmitted under seal." 50 U.S.C. 1803(b). FISA also states that "[t]he record of proceedings under [FISA], including applications made and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of Central Intelligence." 50 U.S.C. 1803(c).

gations every time the target of that surveillance files a motion to suppress. The Due Process Clause contains no inflexible requirement of disclosure to the defendant of all materials considered by the court in adjudicating the legality of an investigation. See *United States* v. *R. Enterprises, Inc.*, 111 S. Ct. 722, 728-729 (1991) (approving in camera procedures in trial court's review of a motion to quash a grand jury subpoena because of the "strong governmental interests in maintaining secrecy" of grand jury materials); cf. *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 58-60 (1987) (trial court may conduct in camera review of confidential records relating to child abuse to determine whether State complied with obligation to disclose exculpatory information).

In this case, the Attorney General filed an affidavit indicating that disclosure of the FISA authorization materials would jeopardize national security interests, and the magistrate concluded that no disclosure was required to make an accurate determination of the legality of the FISA surveillance. Petitioner's rights under FISA were amply protected by the determination of five judges—the FISA judge, the district judge, and the three court of appeals judges—that the FISA surveillance met the requirements of the statute. In light of that protection, and in light of the heightened concerns for confidentiality that are presented in the context of gathering foreign intelligence, the procedures for reviewing surveillance orders under FISA satisfy due process.

2. Petitioner also claims (Pet. 10-16) that the FISA surveillance violated his Fourth Amendment rights. He suggests FISA is unconstitutional because it does not require a warrant based on probable cause to believe that the target committed a crime. Alternatively, he claims that such a warrant is con-

stitutionally required at least when the government develops a criminal interest in a target who is a United States citizen. Neither contention has merit.

Prior to the enactment of FISA, several courts had held that the President has inherent power to conduct warrantless electronic surveillance to gather foreign intelligence information, and that such surveillance constitutes an exception to the warrant requirement.[10] By enacting FISA, Congress imposed statutory restrictions on that form of surveillance. FISA permits the issuance of an order authorizing electronic surveillance only when the government certifies, among other things, "that the purpose of the surveillance is to obtain foreign intelligence information." 50 U.S.C. 1804(a)(7)(B). In order to permit FISA surveillance, the judge must find, *inter alia*, that a senior government official has made the requisite certification;[11] further, as to a United States citizen, the judge must find that the certification is not clearly erroneous. 50 U.S.C. 1805(a)(5). The judge must also find that "there is probable cause to believe" that the target of surveillance is a foreign

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[10] See *United States* v. *Truong Dinh Hung*, 629 F.2d 908, 912-914 (4th Cir. 1980), cert. denied, 454 U.S. 1144 (1982); *United States* v. *Buck*, 548 F.2d 871, 875 (9th Cir.), cert. denied, 434 U.S. 890 (1977); *United States* v. *Butenko*, 494 F.2d 593, 605 (3d Cir.) (en banc), cert. denied, 419 U.S. 881 (1974); *United States* v. *Brown*, 484 F.2d 418, 426 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974). But see *Zweibon* v. *Mitchell*, 516 F.2d 594, 651 (D.C. Cir. 1975) (en banc) (dictum), cert. denied, 425 U.S. 944 (1976).

[11] The certification must be made by the Assistant to the President for National Security Affairs or an Executive Branch official that the President designates who is employed in the field of national security or defense and is subject to Presidential appointment and Senate confirmation. 50 U.S.C. 1804(a)(7).

power or an agent of a foreign power and that the place of surveillance is being used or will be used by a foreign power or an agent of a foreign power. 50 U.S.C. 1805(a)(3).

While FISA does not require probable cause to believe that the surveillance will turn up evidence of a crime, the Fourth Amendment does not mandate such a finding in this context. This Court has recognized that the showing required by the Fourth Amendment to justify surveillance for national security purposes is not necessarily the same as the showing required for a criminal investigation. In *United States* v. *United States District Court*, 407 U.S. 297, 322-323 (1972), the Court stated that "[d]ifferent standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens." That statement is consistent with this Court's recognition that "[w]hat is reasonable" for Fourth Amendment purposes "depends on all of the circumstances" and that "the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests.'" *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) (citation omitted). Applying that approach, this Court has upheld departures from the criminal warrant standard "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987).[12] FISA's requirements,

[12] See *Griffin*, *supra* (search of the home of a probationer); *New York* v. *Burger*, 482 U.S. 691, 699-703 (1987) (search of regulated business); *O'Connor* v. *Ortega*, 480 U.S. 709, 721-725 (1987) (search of employees' desks and offices); *New Jersey* v.

which are specifically tailored to the special needs of foreign intelligence surveillance, are similarly justified.

This country has a vital need for reliable foreign intelligence. As this Court said in *Snepp* v. *United States*, 444 U.S. 507, 512 n.7 (1980) (per curiam), "[i]t is impossible for a government wisely to make critical decisions about foreign policy and national defense without the benefit of dependable foreign intelligence." In light of that need, Congress has ample justification for authorizing foreign-intelligence surveillance without probable cause to believe that the surveillance will yield evidence of crime.[13] Moreover, the procedures governing the issuance of FISA orders—including certifications by senior government officials and detailed descriptions of the information sought, coupled with review by the specially constituted FISA court—adequately protect the privacy interests of targets. See *United States* v. *Duggan*, 743 F.2d 59, 73 (2d Cir. 1984); *United States* v. *Pelton*, 835 F.2d 1067, 1075 (4th Cir. 1987), cert. denied, 486 U.S. 1010 (1988); *United States* v. *Cavanagh*, 807 F.2d 787, 790-791 (9th Cir. 1987);

T.L.O., 469 U.S. 325, 337-342 (1985) (search of students' property at school).

[13] Given that the purpose of FISA surveillance is not to investigate criminal activity but to gather foreign intelligence, a requirement that the surveillance must be likely to turn up evidence of crime would be "illogical." *United States* v. *Cavanagh*, 807 F.2d 787, 791 (9th Cir. 1987). This Court has recognized that the probable cause requirement should be tailored to the specific "governmental interest at stake." *Camara* v. *Municipal Court*, 387 U.S. 523, 534-539 (1967) (holding that, in light of the purpose of an administrative search to enforce compliance with uniform safety standards, the probable cause for a search warrant may be shown on an area-wide basis).

Spanjol, 720 F. Supp. at 58; *In re Kevork*, 634 F. Supp. 1002, 1010-1014 (C.D. Cal. 1985), aff'd, 788 F.2d 566 (9th Cir. 1986); *Falvey*, 540 F. Supp. at 1311-1312.

There is no merit to petitioner's suggestion that the government may not rely on a FISA warrant to conduct surveillance once it develops a supplementary interest in enforcing the criminal law against a target. Pet. 16 & n.3. It is readily foreseeable that criminal concerns may develop in the course of investigating such matters as international terrorism. Yet as long as foreign intelligence needs are the predominant reason for the surveillance, the framework set forth in FISA remains justified. A more restrictive standard would unduly impede the gathering of foreign intelligence, since many of the activities that are investigated under FISA also constitute crimes. See *United States* v. *Sarkissian*, 841 F.2d 959, 965 (9th Cir. 1988).

To ensure that FISA surveillance is faithful to the statute's purpose, courts have required that the surveillance be conducted "primarily" to obtain foreign intelligence. *Pelton*, 835 F.2d at 1075; *Duggan*, 743 F.2d at 77. After reviewing the FISA applications in this case, both courts below concluded that, from the first surveillance authorization in July 1988 until July 1989 when petitioner was arrested, the primary purpose of the surveillance was to collect foreign intelligence and not to further any criminal investigation. See Pet. App. 19a. That factual finding, in which both courts below concurred, does not warrant this Court's review.[14]

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[14] Petitioner also argues (Pet. 17-18) that the government failed, in violation of the FISA statute, to state the results of the initial surveillance in seeking extensions of the surveillance order. The court of appeals correctly rejected that claim. Pet. App. 26a-27a. The FISA statute expressly permits the FISA

3. Petitioner contends (Pet. 20-28) that his conviction for violating 18 U.S.C. 957 should be reversed on the ground that that statute violates the First Amendment. He does not argue that Section 957 violates his own First Amendment rights, since his possession of the Harwich laboratory, in which he carried out research and development of PIRA weaponry, does not implicate free speech concerns. Rather, he relies on the overbreadth doctrine, which allows a constitutional challenge to a statute whose terms are so broad as to chill a "substantial" amount of protected speech by other persons, even though the statute could legitimately be applied against the defendant. See *Forsyth County* v. *The Nationalist Movement*, No. 91-538 (June 19, 1992), slip op. 6-7; *New York State Club Ass'n* v. *City of New York*, 487 U.S. 1, 11, 14 (1988); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973). The court of appeals' decision rejecting petitioner's overbreadth argument is correct and does not conflict with any decision of this Court or another court of appeals.

Because the overbreadth doctrine is " 'strong medicine' " that is used " 'sparingly and only as a last resort,' " a law may not be invalidated unless it is " 'substantially overbroad.' " *New York State Club Ass'n*, 487 U.S. at 14, quoting *Broadrick*, 413 U.S. at 613, 615. To succeed in his challenge, petitioner must show from the text of the statute and from actual fact "that a substantial number of instances exist in which the [l]aw cannot be applied constitutionally."

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judge to extend a surveillance "on the same basis as [the] original order." 50 U.S.C. 1805(d)(2). Although a FISA application must contain "a statement of the facts concerning all previous applications * * * and the action taken on each previous application," 50 U.S.C. 1804(a)(9), there is no requirement that the application describe the results of any prior surveillance.

New York State Club Ass'n, 487 U.S. at 14. Petitioner argues (Pet. 22) that "[t]he criminalization of the 'willful' possession of papers 'in aid of a foreign government' poses a serious threat to American citizens' basic right to speak out and participate in matters of international concern." The statute, however, does not penalize the mere possession of papers in aid of a foreign government; rather, the papers must be "used or designed or intended for use" in the commission of a crime or the violation of an international obligation of the United States.

As the court of appeals explained, Pet. App. 54a, it is not the "subversive message" of a paper at which the statute is directed, but its use as an "instrumentalit[y] of crime." On that construction, the statute would reach, for example, the possession of such papers as a counterfeit dollar or the blueprints for a bomb when the possessor intends to use these items in violating a penal statute or an international obligation of the United States in aid of a foreign government. On the other hand, the statute would not make illegal such conduct as the possession of a paper that merely advocates lawless activity in aid of a foreign government.

It is a familiar principle that the courts should construe federal statutes to avoid constitutional problems when such a construction is reasonable and consistent with the congressional intent. *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 504 (1979). The court of appeals applied that principle here. Under the court's reading of Section 957, the statute is not "substantially overbroad" and, as in *New York State Club Ass'n*, 487 U.S. at 14, and *Broadrick*, 413 U.S. at 615-616, it must therefore be assumed that

"whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which [the statute's] sanctions * * * may not be applied."

Petitioner further implies (Pet. 23) that the statute infringes on First Amendment rights by predicating criminal liability on a person's knowledge of United States treaty obligations, international law, and even foreign law. That claim raises, at most, an issue of whether the statute provides sufficient notice of the conduct it criminalizes to satisfy the Due Process Clause. It is settled, however, that one whose conduct is clearly governed by a statute may not successfully challenge it for vagueness. *Parker* v. *Levy*, 417 U.S. 733, 756 (1974). Here, petitioner's liability under Section 957 did not depend on his knowledge of any treaty obligation of the United States, international law, or foreign law, but rested on his presumed knowledge of federal criminal law. Accordingly, petitioner lacks standing to object to the statute on vagueness grounds.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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